Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC,
AND PAUL G. ALLEN,
PETITIONERS,

v.

COUNTY OF SANTA CRUZ, CALIFORNIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case poses important legal questions for the cable industry and beyond. Here, the district court ruled after an eight-day trial that Respondent County of Santa Cruz had acted unlawfully in attempting to extract monetary payments and other concessions from its cable franchisee, Petitioner Charter Communications Properties, LLC, in return for the County's consent to the acquisition of Charter by Petitioner Paul G. Allen. The district court ruled that the County's actions violated the Cable Act and related FCC regulations, the First Amendment, and the franchise agreement. The U.S. Court of Appeals for the Ninth Circuit reversed, concluding that the trial court had applied the wrong standard in not showing substantial deference to the County.

The questions presented are as follows:

1. Whether a local government's actions in refusing to consent to a change of control of a cable franchisee are entitled to substantial deference, where such deference conflicts with the uniform national policy established by the Cable Act and related FCC regulations.

2. Whether a cable operator waives its right to challenge actions of a local government on First Amendment grounds by virtue of having entered into a franchise agreement with the local government.

3. Whether a local government's actions in refusing to consent to a change of control of a cable franchisee constitute "legislative acts" subject to substantial deference, where the local government acts pursuant to its contractual obligations under a franchise agreement.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Charter Communications, Inc., has no parent corporation. No publicly held company owns 10 percent or more of the stock of Charter Communications, Inc.

The parent company of petitioner Charter Communications Properties, LLC, is Charter Communications, Inc. No publicly held company owns 10 percent or more of the stock of Charter Communications Properties, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Charter Communications, Inc., Charter Communications Properties, LLC, and Paul G. Allen respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. at 1a-13a) is reported at 304 F.3d 927. The district court's findings of fact and conclusions of law after bench trial (App. at 14a-78a) are reported at 133 F. Supp. 2d 1184.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2002. A petition for rehearing was denied on November 15, 2002. (App. at 79a-80a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides that "Congress shall make no law * * * abridging the freedom of speech."

The provisions of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779; the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460; and the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, (collectively, the "Cable Act") and implementing regulations are involved in this case. Due to the length of

these provisions, the pertinent text thereof is set forth in Appendix D to the Petition. (App. at 81a-119a.)

STATEMENT OF THE CASE

In 1998, Petitioner Paul G. Allen entered into an agreement to purchase Petitioners Charter Communications, Inc. and Charter Communications Properties, LLC (collectively "Charter"). Charter and Mr. Allen then sought approval for this transfer of ownership from the approximately 470 local franchising authorities, including Respondent County of Santa Cruz, California (the "County"), for which Charter served as cable franchisee. When the County refused to give its consent to the change in control unless Charter acquiesced to monetary payments and other concessions in excess of federal limits, Petitioners brought this 42 U.S.C. § 1983 action against the County. Petitioners alleged violations of their rights under the Cable Act, the First Amendment, and the franchise agreement. The actions of the County here -- using a change in ownership as a means to extract impermissible monetary payments and concessions from a local cable franchisee -- set a dangerous precedent, with the potential for disastrous effects on Charter and the entire cable industry.

1. In July 1998, Paul Allen entered into an agreement to purchase approximately 94 percent of the outstanding shares of Charter and certain Charter affiliates as part of a $4.5 billion national transaction. At the time, Charter had nearly 500 local cable franchises[1] and approximately 1.2 million cable subscribers nationwide. (App. at 21a.)

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[1] Every cable television operator (with limited exceptions) must obtain a franchise from the local community in which it intends to do business. 47 U.S.C. § 541(b)(1).

2. One of Charter's cable franchises included the southern portion of Santa Cruz County, California. Charter had obtained this franchise in 1998 from a previous franchisee. The franchise agreement between Charter and the County required Charter to pay a 5 percent franchise fee to the County, which is the maximum fee allowed by federal law. (App. at 27a.) In addition, the agreement incorporated certain provisions of the County's Cable Ordinance into the terms of the contract, including those relating to a change of control. Under these provisions, Charter was required to obtain the County's consent to any subsequent transfer of ownership, with such consent not to be "unreasonably withheld." (*Id.* at 42a.)

3. On August 18, 1998, Charter formally notified all of its local franchising authorities, including the County, of the transaction involving Mr. Allen. On that date, Charter furnished each local government with a fully completed FCC Form 394, thereby requesting the consent of the County and triggering the 120-day transfer process set forth in the Cable Act. *See* 47 U.S.C. § 537. Form 394 is the specific application promulgated by the FCC for use in seeking transfer approval from local franchise authorities.[2]

4. The County responded to Charter's submission by requesting voluminous information regarding the Charter/Allen transaction. The County's request was set out in a nine-page letter that sought a detailed response regarding

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[2] Charter's Form 394 established that, among other things, (i) Charter would continue to be the franchisee; (ii) the transaction would be financed from Mr. Allen's personal assets and would not result in any increase in Charter's debt; (iii) Charter's management would remain under the personal direction of Jerard Kent, Charter's CEO; (iv) the sale required the consents from local franchising authorities representing 90 percent of total subscribers; and (v) Mr. Allen had sufficient assets to close the transaction and to operate Charter's system. (App. at 22a-23a.)

over 70 categories of information. (App. at 28a.) The County later propounded a second request, nearly eight-pages long, for 31 additional categories of information. (*Id.* at 33a-34a.) The County also insisted that Mr. Allen and Charter fund a "due diligence" study, at an estimated cost of $39,000. (*Id.* at 26a-27a; 30a.)

Charter complied with the County's first information request and provided a two-inch thick response with supporting documentation. This response included (i) financial statements; (ii) ten-year projected income statements; (iii) information about the purchase price; (iv) information about Mr. Allen's management role; (v) information that the debt of the Charter affiliate which held the franchise with the County would be reduced by $38 million; and (vi) reassurance that the purchase price could not, under federal rate regulations, be used to increase rates. (App. at 29a.)

After the County issued its second request for information, Charter and Mr. Allen informed the County that they believed this request to be unreasonable and declined to respond. (App. at 34a-35a.) At that time, the County also demanded that Charter pay some sort of "mitigation fee" in return for its approval. Charter refused to pay any such fee.

5. Thereafter, on December 8, 1998, the County adopted a "resolution" denying its consent to the transfer without prejudice. In the denial resolution, the Board of Supervisors blamed Charter's refusal to comply with the County's information requests and professed concern over the impact of the transaction. No representative of Charter or Mr. Allen was notified in advance of this meeting. (App. at 38a-39a.)

A week later, the Board of Supervisors authorized its negotiators to consent to the transfer if Charter agreed to a two-year rate freeze and a payment to the County of

approximately $500,000. Charter refused these demands. (App. at 41a.)

On December 23, 1998, the Charter/Allen transaction closed.[3] The County then issued a notice that Charter had violated the franchise agreement by closing without the County's consent and threatened to revoke the franchise and/or impose liquidated damages. (App. at 42a.)

6. Charter and Mr. Allen filed this declaratory action in the U.S. District Court for the Northern District of California. After an eight-day bench trial involving approximately a dozen witnesses, thousands of pages of exhibits and extensive briefing by the parties, the district court ruled in favor of Charter and Mr. Allen. The district court's thorough opinion found that the County's denial of consent was based on Petitioners' failure to comply with the County's information requests, demand for a pre-funded due diligence study, request for a cash payment of $500,000, and demand for a further rate freeze. (App. at 42a-43a.) Based on these findings of fact, the district court held that the County had violated the Cable Act, the First Amendment, and the franchise agreement by denying its consent to the transfer.

The district court set out a detailed analysis of the FCC's 120-day regulation and Form 394. The district court found that the County's first information request was "so unreasonable in scope that it should have been deemed ineffective under the FCC rule [47 C.F.R. § 76.502] to require a response." (App. at 61a-62a.) As for the County's second information request, the court held that this request was

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[3] Of the more than 470 local franchise authorities with whom Charter dealt, only four (the County and three other communities also represented by the County's outside counsel) refused their consent. (App. at 24a.)

"unreasonable" because of its timing, having been made after the required 30-day window, and because of its scope. (*Id.* at 62a-63a.)

The district court also found that the County's request for Charter to fund the due diligence study and its request for a $500,000 mitigation fee violated the 5 percent maximum franchise fee limitation established in 47 U.S.C. § 542 of the Cable Act. The district court also found that the County's request that Charter and Mr. Allen accept an extension of the existing rate freeze violated § 543(a)(1) of the Cable Act and the FCC's implementing order. (App. at 70a-71a.)

Finally, the district court held that the County's actions had violated the First Amendment rights of the plaintiffs. The court noted that the operation of a cable franchise "plainly implicate[s] First Amendment interests." (App. at 72a (citation omitted).) The district court then applied the intermediate level of scrutiny applicable for government regulations that incidentally burden First Amendment rights. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). Based on this analysis, the district court concluded that "the County's approach burdened substantially more speech than was necessary to further its legitimate interests." (App. at 77a.)

7. The U.S. Court of Appeals for the Ninth Circuit reversed the lower court's decision. In considering whether the County's denial of consent was reasonable, the court of appeals explained that it first needed to answer a "preliminary question," namely, "is the County owed any deference to its determinations of what is reasonable under the circumstances?" (App. at 5a.) The court of appeals answered this question in the affirmative, concluding that the County must be accorded substantial deference because the County's decision to deny consent was a "legislative action." (*Id.* at 5a-6a.)

The Ninth Circuit then examined whether there was a sufficient basis for the County's denial of its consent to the change of control. The court of appeals concluded that, based on this deferential standard, "it was not unreasonable for the County to be concerned about Allen's true net worth and about the relationship of that wealth to the viability of the enterprise." (App. at 9a.) According to the appeals court, the County was entitled to be concerned that Mr. Allen had paid what, in the County's view, was a significantly above market-value purchase price for Charter. The Ninth Circuit concluded that it "cannot say the County acted without a rational basis" for its decision to deny consent. (*Id.* at 11a.)

The court of appeals also dismissed the First Amendment issues raised by Charter and Mr. Allen. It held that, because "Charter voluntarily entered into an agreement under which the County had to approve any transfer of the franchise," Charter had "waived its right to claim that a denial of a transfer violated its First Amendment rights." (App. at 11a-12a.)

A timely petition for rehearing and rehearing en banc was denied. (App. at 79a-80a.)

REASONS FOR GRANTING THE PETITION

I. The Substantial Deference Accorded By The Ninth Circuit To A Local Government's Decision To Refuse Consent To A Change Of Control Conflicts With The Uniform National Policy Established By The Cable Act And FCC Regulations

Based on its conclusion that the County was entitled to substantial deference, the court of appeals eschewed any real scrutiny of the County's rationale for its denial of consent to Charter's change of control. In fact, the Ninth Circuit declined even to apply the requirements of the Cable Act, stating that it could "see no reason for either the district court or this panel to reach the issues regarding the Cable Act." (App. at 3a n.3.) Yet, in enacting the Cable Act, Congress clearly intended to establish a uniform national policy for cable television. There can be no basis for the Ninth Circuit's failure to apply the Cable Act here. The national scheme established by the Cable Act nowhere provides for the extreme deference accorded the County in this case.

The consequences of the Ninth Circuit's erroneous approach are serious. In essence, it eliminates meaningful judicial review of a local government's actions in the transfer process. By fatally distorting the uniform national policy for cable regulation, the Ninth Circuit nullifies Congress' effort to streamline cable regulation and threatens the flow of capital into the cable industry.

A. The Cable Act And Implementing FCC Regulations Establish A Uniform National Policy Which Circumscribes The Role Of Local Franchising Authorities

In establishing a national framework for the regulation of cable television, Congress carefully constrained the role of

local governments. The unbridled deference accorded the County by the court of appeals is clearly inconsistent with this national policy enunciated in the Cable Act and implementing FCC regulations.

1. In the Cable Communications Policy Act of 1984, and in subsequent amendments in 1992 and 1996, Congress was explicit that its purpose was to "establish a national policy concerning cable communications." 47 U.S.C. § 521(1). Congress was concerned about the unwieldy, conflicting patchwork of rules and regulations being imposed by various municipal governments across the country. Through a uniform national policy, it sought to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." *Id.* § 521(6). In doing so, Congress aimed to limit the role of local authorities, expressly stating that the Cable Act and implementing FCC regulations were intended to "establish guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems." *Id.* § 521(3).

2. This Court and the lower courts have recognized on numerous occasions the preeminence of national cable policy and the concomitant limited role of local franchising authorities in this national scheme.

Thus, in both *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), and *City of New York v. FCC*, 486 U.S. 57 (1988), this Court upheld federal cable regulations against local attempts to regulate the cable industry. In both cases, this Court acknowledged the FCC's efforts, which were in line with Congress' intentions, to bring uniformity to important aspects of the cable industry. The *Capital Cities Cable* Court noted that "uniform national communications policy with respect to cable systems would be undermined if state and local governments were permitted to regulate in

piecemeal fashion the signals carried by cable operators pursuant to federal authority." 467 U.S. at 714. Likewise, in *City of New York*, this Court recognized the "compelling need for national uniformity in cable television technical standards" and the "necessity to rationalize, interrelate, and bring into uniformity the myriad standards [then] being developed by numerous jurisdictions." 486 U.S. at 60 (citation and internal quotation marks omitted).

Examples of lower courts adhering to these same national policy principles abound. For example, the court of appeals in *Time Warner v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), ruled that the Cable Act preempted rate regulation and components of the basic service tier. As that court explained, the Cable Act was "designed to establish a national cable policy and to facilitate innovation and competition in the cable industry by limiting rate regulation. . . ." *Id.* at 187 (concluding it was "Congress's clear intention in the 1992 Cable Act to preempt local regulation of the components of the basic tier." *Id.* at 198.).[4]

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[4] *See also City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (striking down as preempted a local ordinance setting up an application process for awarding franchises to provide telecommunications services), *cert. denied*, 534 U.S. 1079 (2002); *Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2d Cir. 1997) (enjoining city's attempt to place commercial programming in public, educational, or governmental access channel in contravention of Cable Act); *Tribune-United Cable of Montgomery County v. Montgomery County*, 784 F.2d 1227 (4th Cir. 1986) (staying county's efforts to enforce penalties provision of franchise agreement due to request to modify franchise agreement under Cable Act); *City of Ottawa v. Sammons Communications, Inc.*, 836 F. Supp. 555 (N.D. Ill. 1993) (striking down local application of rate provisions of 1984 Cable Act); *Jones Intercable, Inc. v. City of Stevens Point*, 729 F. Supp. 642 (W.D. Wis. 1990) (striking down ordinance requiring a cable operator to carry specific cable services).

In the context of this statutory and regulatory structure, which gives preeminence to the national policy and restricts the role of local governments, the deference afforded the County by the court of appeals here is misguided and improper.

B. The Substantial Deference Accorded By The Ninth Circuit To The Local Government Is Contrary To The Rules And Procedures For A Change of Control Established By The Cable Act And Implementing FCC Regulations

The Cable Act and implementing FCC regulations set out the general parameters relating to the role of local franchising authorities in connection with transfers of control. In doing so, a critical federal concern was that individual local governments not be permitted to use the transfer process as a pretext to extract otherwise impermissible concessions from cable operators. Thus, the FCC clearly stated that

> in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters.

In re Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992, 8 F.C.C.R. 682, ¶ 39 n.38 (1993) (hereinafter "1993 Order"). The FCC clearly understood the opportunities for mischief if hundreds, or even thousands, of local franchising authorities were able to use the approval of transfers as a basis to negotiate concessions of all sorts.

However, such mischief is precisely what the district court found occurred here. The County "tried to do exactly what footnote 38 and federal law prohibit." (App. at 71a.)

The district court properly held that the County's demands were illegal and in direct contravention of the federal limitations established by the Cable Act and related regulations. Yet, because of its deference to the County, the Ninth Circuit concluded that it need not address these Cable Act violations. The appeals court's deferential standard served to remove effective judicial review and countenanced multiple violations of the Cable Act. This refusal to apply the Cable Act was erroneous and should be reviewed by this Court.

1. The FCC has established procedures for transfers of control which preclude the multiple, burdensome information requests propounded by the County here. Under federal law, the local franchising authorities have "120 days to act upon any request for approval" of a sale or transfer. 47 U.S.C. § 537. The FCC also developed FCC Form 394 for cable franchisees to submit when seeking transfer approval from local franchising authorities.[5]

The district court properly held that the County's voluminous and irrelevant information requests were directly contrary to these procedures for transfers. The County's reliance on Charter's refusal to meet its unlawful information demands was an improper basis to deny consent to the transfer. This federal law violation is not entitled to "deference."

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[5] Form 394 was designed to include "the information necessary to establish the legal, technical and financial qualifications of the proposed transferee." *See* 1993 Order at ¶¶ 85-86. Beyond the information included with Form 394, local franchising authorities may request only additional information that is "reasonably necessary to determine the qualifications of the proposed . . . transferee." *See In re Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992*, 10 F.C.C.R. 4654, ¶ 50 (1995).

2. The Cable Act also imposes a cap of 5 percent of annual gross revenues on franchise fees "or assessments of any kind" that may be collected by a local government from a cable operator. 47 U.S.C. § 542(b). This provision has been strictly interpreted to prevent local governments from circumventing this cap by manufacturing various "miscellaneous" costs for a franchisee to pay. *See id.* § 542(g).[6]

The district court recognized the County's demands that Charter fund a due diligence study and make a $500,000 "mitigation payment" for what they were -- a "blatantly illegal" additional assessment against a cable operator in contravention of the Cable Act. (App. at 70a.) Again, deference cannot excuse this Cable Act violation.

3. The Cable Act prohibits franchising authorities from regulating rates in a manner which is inconsistent with its terms. 47 U.S.C. § 543. This section sets out in detail the rules regarding regulation of cable rates. *Id.* These rules severely restrict the local government's ability to regulate rates. 47 C.F.R. § 76.910.[7]

The County's demand for a further rate freeze in order to approve the transfer was impermissible under these federal cable regulations. Consequently, the district court found a

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[6] *See, e.g., Robin Cable Sys., L.P. v. City of Sierra Vista*, 842 F. Supp. 380, 381 (D. Ariz. 1993); *Time Warner Entm't Co. v. Briggs*, 1993 WL 23710, at *6 (D. Mass. Jan. 14, 1993); *Birmingham Cable Communications, Inc. v. City of Birmingham*, 1989 WL 253850, at *1 (N.D. Ala. May 5, 1989).

[7] *See also Cablevision Sys. Corp. v. Town of East Hampton*, 862 F. Supp. 875, 883-84 (E.D.N.Y. 1994), *aff'd*, 57 F.3d 1062 (2d Cir. 1995); *City of Ottawa*, 836 F. Supp. at 564-65.

violation of the Cable Act. (App. at 70a-71a.) Once again, this federal law violation should not have been overlooked based on misplaced deference.

4. Instead of applying the Cable Act, the court of appeals embarked on a search for any "debatable" reason that might justify the County's denial of consent. The circuit court then latched onto one of the many rationalizations offered by the County: its "concern[s] about Allen's true net worth and about the relationship of that wealth to the viability of the enterprise." (App. at 9a.)

In fact, the County's concern about Mr. Allen's net worth is incredible on its face. As co-founder of Microsoft, Mr. Allen's net worth is well known, and he submitted financial information to the County demonstrating his considerable financial assets. Moreover, Mr. Allen was not going to be the cable franchisee in the County; rather, he was becoming the majority shareholder of the corporate parent of Charter. The holder of the franchise was not changing, nor was Charter management changing. Furthermore, Mr. Allen was paying *cash* and *reducing* the outstanding Charter debt. (App. at 21a-23a; 61a; 76a-77a.) Mr. Allen's financial viability cannot be a serious issue.[8]

The County's "concern" that Mr. Allen overpaid for the company also cannot survive even mild scrutiny. First, the County's second-guessing of the valuation of a private corporate transaction is dubious. Second, as previously noted, Mr. Allen has the assets to support and grow the cable enterprise. Third, Charter could not raise future cable rates

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[8] The Ninth Circuit noted that Mr. Allen's net worth was not contractually obligated. (App. at 8a.) Yet, this misses the mark -- the previous Charter shareholders (like shareholders everywhere) had not obligated their own assets to Charter.

under applicable FCC regulations. Lastly and perhaps most importantly, as noted above, rates are governed by the Cable Act and are subject to very limited local jurisdiction.

While it is highly questionable whether the County's proffered reasons even satisfy the court of appeals' standard, it is clear that a less deferential review would lead to a different ultimate result. For this reason, this Court should examine the Ninth Circuit's application of a deferential standard that is contrary to the federal scheme established by the Cable Act.

C. This Court Should Grant Certiorari To Resolve Confusion About Applying Deference In The Cable Context

1. As noted above, *see supra* note 4, the lower courts have frequently struck down acts of local governments that violated the national policy established by the Cable Act. In none of these cases has the court believed the local government to be entitled to any special deference. The Ninth Circuit is in a distinct minority in its deferential approach. The conflict between the Ninth Circuit and these other courts regarding the deference due local governments when acting in the cable context warrants review by this Court.

2. More specifically, in other cases addressing transfers of control and other comparable circumstances, the lower courts, including even the Ninth Circuit, have applied the Cable Act without any special deference accorded the actions of the local franchising authority.

For example, in *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001), the County of Henrico had refused its consent to the transfer of control relating to AT&T's purchase of its franchisee, MediaOne. There, the county sought to condition its approval on MediaOne providing any requested Internet Service Provider access to its

cable modem platform. The Fourth Circuit held that this denial of consent was improper since the open access requirement was inconsistent with telecommunications law. *Id.* at 362-65 (citing 47 U.S.C. § 541(b)). In its review, the Fourth Circuit did not accord the local county and its actions any particular deference.

Similarly, in *Cable Alabama Corp. v. City of Huntsville,* 768 F. Supp. 1484 (N.D. Ala. 1991), the city attempted to withhold is consent to a transfer because the proposed transferee owned or controlled another cable television system in the area. The court held that the local government was acting outside its authority, concluding that the Cable Act "prohibits local franchising authorities from regulating the ownership or control of local cable television systems based upon ownership or control of any other cable television system." *Id.* at 1500. Again, the *Cable Alabama* court did not accord any deference to the city.

The Ninth Circuit reviewed a denial of transfer of control in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The City of Portland sought to condition its consent to the AT&T purchase of Telecommunications, Inc., one of the nation's largest cable operators, on the provision of open access. Like the Fourth Circuit in *MediaOne*, the *AT&T* court concluded that this condition was contrary to Section 541(b). *Id.* at 876-77. In doing so, the Ninth Circuit panel did not accord any special deference to the local government's actions.

3. In contrast, the Sixth Circuit has relied -- erroneously, in Petitioners' view -- on deference in analyzing a local government's decisions on awarding and renewing cable franchises. *Communications Systems, Inc. v. City of Danville*, 880 F.2d 887 (6th Cir. 1989), involved a challenge by an unsuccessful bidder for a cable franchise. The appeals court relied on the "longstanding presumption that municipalities act properly" and the city's "considerable

discretionary authority." *Id.* at 891-92. In *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434 (6th Cir. 1997), the Sixth Circuit upheld a city's decision to deny a cable operator's proposal for renewal of its cable franchise based on the "considerable deference" the court believed due the actions of a municipality. However, that court also looked to a "preponderance of the evidence" standard, which is different than the more lenient evidentiary standard used by the Ninth Circuit in the instant case. *Id.* at 439-43.

There is evident uncertainty in the lower courts about whether and how much deference to accord a local government acting in the cable area. This Court should grant this Petition to clarify this issue and reaffirm the primacy of the national cable policy established by Congress.

II. A Cable Operator Does Not Waive Its First Amendment Rights Simply By Entering Into A Franchise Agreement With The Local Government

The Ninth Circuit's ruling that Charter waived its First Amendment rights by entering into the franchise agreement is contrary to this Court's exacting standards for waivers of fundamental constitutional rights. Given a regulatory scheme that requires cable operators to obtain a franchise, the court of appeals' conclusion that such franchise agreements constitute waivers is especially troublesome -- this decision serves to preclude any First Amendment challenge to the possibly unconstitutional acts of local governments against cable franchisees.

A. The Franchise Agreement Lacks The Intelligent, Knowing, And Clear Statement Required To Waive Fundamental First Amendment Rights

1. At the conclusion of the bench trial, the district court ruled that the County's withholding of its consent had violated the First Amendment rights of Petitioners. Applying the intermediate level of scrutiny of *United States v. O'Brien*, 391 U.S. 367 (1968),[9] the district court found that the County's denial of consent constituted a First Amendment violation because "the County's approach burdened substantially more speech than was necessary to further its legitimate interests" and because the "substantial governmental interest" identified by the County was, in the court's view, pure conjecture and speculation. (App. at 76a-77a.)

The court of appeals avoided the question of whether the County had infringed Petitioners' First Amendment rights, instead holding that these rights had been waived in the franchise agreement. The Ninth Circuit concluded that Charter had "waived its right to claim that a denial of [the] transfer violated its First Amendment rights" because Charter "voluntarily entered into an agreement under which the County had to approve any transfer of the franchise." (App. at 11a-12a.)

2. There can be no doubt that Charter and Mr. Allen, as current and potential cable operators, are First

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[9] Under *O'Brien*'s intermediate scrutiny test, a content-neutral government regulation must "further[] an important or substantial governmental interest" and be an "incidental restriction" on First Amendment freedoms that is "no greater than is essential" to the furtherance of the government's interest. *O'Brien*, 391 U.S. at 377.

Amendment speakers generally entitled to the protections that that amendment provides. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636, 637, 639 (1994); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986). The question of a waiver of federal constitutional rights is a "federal question controlled by federal law," *Brookhart v. Janis*, 384 U.S. 1, 4 (1966), and this Court has instructed that "every reasonable presumption against waiver" should be indulged before a waiver of constitutional rights may be found, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citation omitted). Furthermore, as this Court admonished in *Fuentes v. Shevin*, "in any context," a waiver of constitutional rights "must, at the very least, be clear." 407 U.S. 67, 95 (1972).

3. Even a cursory review of the franchise agreement reveals that the agreement did not purport to waive Charter's First Amendment rights. The Ninth Circuit pointed to no language in the franchise agreement suggesting a waiver and, in fact, no such waiver language exists. Rather, the franchise agreement expressly reserved for Charter the ability to challenge actions in court. The agreement also expressly limited the County's discretion in reviewing the transfer request: the County's consent could not be "unreasonably" withheld. This limited discretion granted by the franchise agreement is not broad enough to grant the County the ability to act unlawfully or unconstitutionally. *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

4. The Ninth Circuit's casual finding of a waiver by Charter cannot be sustained. The First Amendment "safeguards a freedom which is the 'matrix, the indispensable condition, of nearly every other form of freedom.'" *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)). "Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find

waiver in circumstances which fall short of being clear and compelling." *Id.* at 145. Charter's franchising agreement with the County lacks any clear and compelling statement of waiver.

5. The court of appeals' decision clashes with established law. The Ninth Circuit would create a rule that, by entering into a contract with the government, a speaker waives all rights to challenge the government's actions on First Amendment grounds. Such a rule, however, runs headlong into this Court's jurisprudence that the mere act of contracting with the government is not enough to waive all fundamental rights. *See Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

6. In addition, allowing franchise agreements to be used as the basis for findings of waivers of all First Amendment rights raises troubling issues as a result of the unequal power relationships. As the Seventh Circuit has noted, the undue leverage of local governments in these franchise negotiations makes them inappropriate for finding a constitutional waiver: "Of course in this case the only contract was the initial franchising agreement . . . and serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a programmer on the stipulation that the programmer waive certain constitutional rights." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 n.6 (7th Cir. 1989).[10]

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10 The only case cited by the appeals court below in support of its position was *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310 (8th Cir. 1991). In *Paragould*, the Eighth Circuit held that the cable franchisee had "effectively bargained away some of its free speech rights" by entering into the franchising agreement with the city. *Id.* at 1315. Charter notes the important distinction that the *Paragould* franchisee was

Footnote continued

The Ninth Circuit's decision sets a dangerous precedent. By transforming a relatively innocuous franchise contract into a *carte blanche* waiver of all First Amendment scrutiny by the courts, the Ninth Circuit has upended the standard for judicial review of the government's actions burdening protected speech. The court of appeals' decision is tantamount to a rule by which *all* cable franchisees -- and, indeed, all contractors with any government -- have effectively waived *all* of their First Amendment rights simply by entering into a contract in which the government may exercise some level of discretion.

B. Paul Allen Was Not A Party To The Franchise Agreement And Therefore Could Not Have Waived His First Amendment Rights

1. Finally, as a person who was not a party to the franchise agreement, Paul Allen, in particular, is entitled to have a court review the County's actions under *O'Brien*'s intermediate scrutiny standard. The Ninth Circuit ignored Mr. Allen's rights completely, ruling that "*Charter* was aware of what it was getting itself into" (emphasis added). (App. at 12a n.9.) Even assuming, *arguendo*, that the franchise agreement between Charter and the County constitutes a complete waiver of *Charter*'s First Amendment rights, it hardly can be said that *Mr. Allen*'s rights likewise were surrendered by an agreement he never joined.

Footnote continued from previous page

not challenging the city's conduct under the franchise agreement as Charter is doing here; instead, Paragould was mounting a facial challenge to the terms of the franchise agreement itself. *Id.* Nevertheless, to the extent that *Paragould* is consistent with the finding of waiver by the court of appeals here, Charter urges granting the writ of certiorari to correct the misguided doctrine found in *Paragould* and the instant case.

If, as this Court has stated, courts must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights," *Johnson*, 304 U.S. at 464, the Ninth Circuit's *sub silentio* conclusion that Mr. Allen waived his First Amendment rights under a contract to which he never was a party simply cannot be countenanced. Therefore, summary reversal, or at least review by this Court, is appropriate.

III. A Local Government Does Not Engage In "Legislative Acts" When It Acts Pursuant To Contractual Obligations And Denies Consent To A Change Of Control Of Its Cable Franchisee

The court of appeals afforded the County substantial deference because it concluded that the County's denial of consent constituted a "legislative act." (App. at 6a.) However, by deeming the County's decision to withhold its consent to the transfer a "legislative act," the Ninth Circuit misconstrued the nature of the County's action and the applicable legal doctrines.

1. Here, the Ninth Circuit concluded that the County's decision was a "legislative" act based on three factors. First, the court of appeals noted that it was reviewing "a discretionary decision" of a "legislative body," the County's Board of Supervisors. Second, the court concluded that consents to a transfer of ownership for a franchise "should, a fortiori, be viewed as a legislative action" just as grants, renewals, and consents to rate increases are "legislative" acts. Finally, the court of appeals explained that the County's cable ordinance operates for the benefit of all the County's residents. (App. at 5a-6a.)

2. The Ninth Circuit's approach in this case is contrary to the more nuanced analysis proscribed by this Court and followed by the majority of the circuit courts of appeals. As this Court explained recently, "[w]hether an act is legislative turns on the nature of the act." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998).[11] A number of lower courts have rejected the notion that the formalities define whether an act qualifies as "legislative." Thus, "[n]ot all actions taken at a legislative meeting by a local legislator are legislative . . . . Nor does voting on an issue, in and of itself, determine that the act is legislative in nature." *Kamplain v. Curry County Board of Comm'rs,* 159 F.3d 1248, 1251-52 (10th Cir. 1998) (citing numerous cases). As *Kamplain* and the many cases that it cites demonstrate, the fact that Charter's consent to transfer was denied by the County's Board of Supervisors in a formal vote is far from determinative.

3. The court of appeals also cited to no precedent in support of its position that "grants, renewals and consents to rate increases" are invariably legislative acts. (App. at 5a-6a.) Certainly, questions arise as to whether this characterization of grants, renewals, and rate increases as legislative is accurate. More importantly, the appeals court failed to recognize that Charter's claim was for breach of its *contract* with the County. The County's actions were not

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11 The *Bogan* decision expressly left open the question of whether the formal legislative character of an action was sufficient to constitute a legislative act. *Id.* at 55. This Court found the ordinance in question in *Bogan* to be legislative "in substance" because it was a "policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents." *Id.* at 55-56. The Court contrasted this type of policymaking with the legislature's "hiring or firing of a particular employee" which would presumably not be legislative. *Id.* at 56.

"legislative" acts which formulated policy for future cases. Rather, they were actions which administered, and breached, the express terms of a pre-existing contact. As such, these acts by the County relating to the implementation of Charter's franchise agreement were administrative/executive and *not* legislative.

As this Court has explained, "[l]egislation . . . looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908). That is plainly not what the County was doing in denying Charter's consent to transfer. It was administering and implementing a contract, and such acts are not entitled to the "substantial deference" accorded legislative acts.[12]

A. The Ninth Circuit's Decision That These Are "Legislative Acts" Conflicts With Decisions Of Other Courts Of Appeals

The Ninth Circuit's conclusion that the County's denial of consent under its franchise agreement was a "legislative" act contrasts sharply with the analyses applied by other circuits.

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[12] In a footnote, the Ninth Circuit opined that the County is entitled to deference even if this was an administrative (and not legislative) act. (App. at 6a n.4.) Plainly, the County is not entitled to any *Chevron* deference since it is not acting in a rule-making capacity and has no special expertise. Rather, when acting pursuant to its contractual obligations, the County should be treated like any other party. The district court did exactly this and found the explanations offered by the County for refusing consent to be pretextual and unlawful.

1. Here, the County's decision to deny consent was an ad hoc decision and did not involve a prospective, legislative type rule. It addressed a single entity, Charter, and was undertaken pursuant to the provisions of Charter's franchise agreement with the County. Thus, the County was not engaged in "policy-making of a general purpose" or "line drawing." *Carver v. Foerster*, 102 F.3d 96, 100 (3d Cir. 1996). Nor did the denial of consent to Mr. Allen's purchase of Charter somehow "involve[] establishment of a general policy." *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 9 (1st Cir. 2000) (citation omitted). Accordingly, the Ninth Circuit erred in concluding that the County had engaged in "legislative acts."

2. In closely comparable situations, other courts of appeals have reached very different results from the court of appeals here. The Ninth Circuit's analysis squarely conflicts with the approach of the Sixth Circuit in *Wojcik v. City of Romulus*, 257 F.3d 600 (6th Cir. 2001). *Wojcik* also involved a local government's denial of consent to a transfer of control. In *Wojcik*, the Sixth Circuit confronted a case involving a city's refusal to allow a transfer of liquor and entertainment licenses to a prospective new owner. *Id.* at 603. Like here, the decision to allow the transfer of the licenses was within the city's discretion, as established by local ordinance. *Id.* at 613. The plaintiffs sought to characterize the city's denial of their request for transfer as a "legislative" action. *Id.* at 612. The Sixth Circuit disagreed. Instead, unlike the Ninth Circuit here, *Wojcik* rejected the plaintiffs' assertions that the action was "legislative" because it had been made by the city council and that the city council had been engaged in "policymaking." *Id.* at 612-13.

3. Other circuits have differentiated between the establishment of a zoning rule and the enforcement of that rule, holding that the former is a "legislative" act while the latter is not. *Bryan v. City of Madison*, 213 F.3d 267, 273 (5th Cir.

2000), *cert. denied*, 531 U.S. 1145 (2001); *Scott v. Greenville County*, 716 F.2d 1409, 1423 (4th Cir.1983); *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).[13]

4. Even if the County's decision here were comparable to the awarding of bids and purchasing property, it would not be due the extreme deference granted by the Ninth Circuit. As the Tenth Circuit noted in *Kamplain*, contracting activity such as bids and purchasing was properly regarded as administrative or executive, and not legislative acts. "[W]e believe that the function of awarding of bids is essentially an administrative or executive function. Awarding bids and purchasing county property are actions whereby the Board applies known rules and legislation to make an administrative business decision." *Kamplain*, 159 F.3d at 1252-53 (and cases cited therein).

5. Indeed, the Ninth Circuit's decision here ignores its own previous holding that the "[a]dministration of a contract does not involve the formulation of policy." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984). In *Cinevision*, the Ninth Circuit addressed a city council's decision to disapprove a proposed concert at a city amphitheatre where the city acted pursuant to the terms of the concert promoter's contract with the city. The *Cinevision* Court held that the city council's vote on a contract was not

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13 It is not the enactment of an overall plan or the establishment of a general policy, both of which could be said to be legislative in nature . . . . In our case the Planning Board merely decided to insist on completion of a particular road before granting approval of a specified proposed subdivision.

Cutting, 724 F.2d at 261. *See also Haskell v. Washington Township*, 864 F.2d 1266, 1277-78 (6th Cir. 1988).

"legislative" but, instead, "was simply monitoring and administering" the contract. *Id.* As the court explained then, "[a]dministration of a municipal contract -- a contract between a private party and a municipality -- would generally seem to be an executive function." *Id.*

6. In connection with this franchise agreement, the County is like any other contracting party acting pursuant to the bargain it struck. In denying Charter's transfer request, it is not making broad policy but engaging in an ad hoc determination which is administrative in nature.[14] The Ninth Circuit acted in direct conflict with other courts of appeals decisions in holding that the County's action here constitutes "legislative acts." This Court should grant this petition to resolve the conflict among the appeals courts and reverse the Ninth Circuit.

IV. The Issues In This Petition Are Important For The Cable Industry And Others

The Ninth Circuit's decision presents a significant problem for the cable industry. To put it bluntly, the Ninth Circuit's decision will allow local franchising authorities to wreak havoc on transactions in the cable television market. Moreover, the Ninth Circuit's striking conclusion that a contract with a government *a fortiori* creates a waiver of First Amendment rights threatens to leave any and all government contractors subject to the whims of the government with

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[14] The Ninth Circuit's suggested remedy for the County's actions -- that "citizens can vote out their local representatives and cable operators can refuse to enter into franchise agreements with notoriously difficult LFAs" (App. at 11a) -- demonstrates the fallacy of the court of appeals' reasoning. The County breached its franchise agreement, thereby injuring Charter and Mr. Allen; voting out the local representatives is not an adequate remedy for Petitioners' breach of contract action.

which they have contracted and without a remedy for violations of their First Amendment and other rights.

1. The potential effects on the cable industry could be dramatic.[15] Tens of thousands of cable franchise agreements throughout this country include provisions requiring local franchise authority consent to a transfer of ownership. Thus, the number of local franchise authorities whose consent is needed for transactions on the scale of the Charter/Allen transaction can be staggering. For example, along with the nearly 500 local franchising authorities involved in the Charter/Allen transaction, the merger of AT&T and TCI in 1999 involved 970 local franchising authorities and the recent merger of Comcast and AT&T involved approximately 1,200 local franchising authorities.

2. The Ninth Circuit's decision raises the prospect of local governments imposing considerable and improper costs on franchisees seeking consents to a transfer of ownership. The FCC has instructed that local franchising authorities may not use their transfer jurisdiction to delay or burden the transactions, or to "circumvent the [FCC]'s authority over rate regulation, franchise fees and other matters." 1993 Order at ¶ 38. Nevertheless, under the regime sanctioned by the Ninth Circuit, a local franchising authority's pretextual "concerns" over a transaction will be given such deference that these local governments are

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15 The importance of the issues raised by this case is reflected in the amicus briefs filed in the district court and court of appeals by the National Cable & Telecommunications Association, American Cable Association, and California Cable and Telecommunications Association, whose members include owners and operators of cable systems serving nearly 100 percent of the nation's cable television households. For the same reason, the National League of Cities and a host of local governments also filed amicus briefs in the courts below.

essentially encouraged to extort unlawful concessions from cable franchisees.

3. What occurred in this case is a prime example of the dangers of the Ninth Circuit's approach. Under the guise of its authority to review the transfer to Mr. Allen, the County made "take it or leave it" demands for Charter to pay a $500,000 "mitigation fee," to pre-fund a $39,000 due diligence study, and to agree to another rate freeze -- all demands that the district court found to be contrary to federal law. Nevertheless, the Ninth Circuit's decision immunized such unlawful demands from judicial review since the County was able to manufacture "some conceivable basis" that was "fairly debatable" for its refusal to consent. (App. at 7a.)

4. One can certainly expect that -- taking their cues from the County of Santa Cruz and the Ninth Circuit -- other local governments may use the transfer process to demand concessions and extract *quid pro quo*s from franchisees that otherwise would be unlawful under federal law.

The cumulative cost and burden resulting from such unlawful demands for concessions will create a marked barrier to transfers in the cable industry. Otherwise straightforward transactions will become infeasible. The Ninth Circuit's decision, therefore, threatens the industry consolidation and flow of capital needed to keep pace with technology, remain competitive in the marketplace, and deliver to consumers new programming, information, and broadband services. *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations*, 15 F.C.C.R. 9816, ¶¶ 1-2 (2000).

5. Finally, aside from the negative impact on the cable industry, the Ninth Circuit's decision has the potential for sweeping ramifications for other government contractors.

The court of appeals' decision undermines the heretofore accepted notion that a government's rights and duties under a contract with a private party are no different than the rights and duties created by contracts between purely private parties. *See, e.g., United States v. Winstar*, 518 U.S. 839 (1996). Second, the Ninth Circuit's decision also has grave First Amendment implications for private parties contracting with governments. The Ninth Circuit's holding would suddenly transform nearly every government contract into an automatic waiver of any right to challenge the government's actions on First Amendment grounds. It also would open the way for findings of broad waivers of due process, property, and other fundamental rights, thereby precluding challenges of unconstitutional governmental actions.

Given the far-reaching implications to the cable industry and other government contractors, this Petition plainly presents issues of exceptional and recurring importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC,
AND PAUL G. ALLEN,
PETITIONERS,

v.

COUNTY OF SANTA CRUZ, CALIFORNIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 01-15846
01-16975
D.C. No. CV-99-01874-WHA(BZ)

CHARTER COMMUNICATIONS, INC., a Delaware corporation;
CHARTER COMMUNICATIONS PROPERTIES, LLC,
PAUL G. ALLEN, an individual,
PLAINTIFFS-APPELLEES,

v.

COUNTY OF SANTA CRUZ,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Northern District of California
William H. Alsup, District Judge, Presiding

Argued and Submitted
May 14, 2002 -- San Francisco, California

Filed September 20, 2002

OPINION

Before: Michael Daly Hawkins and Barry G. Silverman, Circuit Judges, and Jane A. Restani,* Judge.

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* The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation

HAWKINS, Circuit Judge:

These cases surround one central issue: did Santa Cruz County reasonably withhold consent to a change in ownership of a cable franchise? Because we determine the County's denial of consent was reasonable and lawful, we reverse the district court's decision on the merits, mooting the issue of attorney's fees in the companion case.

I. FACTUAL BACKGROUND

The core dispute here involves a lengthy set of negotiations between the County and Charter. While time-consuming and intensive, these negotiations boil down to whether the County's requests for financial and other information from Charter were reasonably related to the exercise of the County's approval authority. A full version of the negotiations can be found in the district court opinion, *Charter Comms. Inc. v. County of Santa Cruz*, 133 F. Supp. 2d 1184, 1187-1200 (N.D. Cal. 2001).

In brief: in 1998, Microsoft co-founder Paul Allen sought acquisition of Charter Communications, Inc. ("CCI"), which owned a subsidiary, Charter Communications LLC ("Charter").[1] Charter had a cable television franchise with the County of Santa Cruz ("the County"); the franchise was administered by the County Board of Supervisors. The County's consent to the change in ownership was necessary for CCI to operate Charter's cable franchise. Under the relevant agreement, such consent could not be unreasonably denied.

After Charter submitted the appropriate forms,[2] the County became concerned, *inter alia*, that the price Allen was

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[1] Unless there is a need to specify otherwise, we refer generically to the plaintiffs-appellees in this action as "Charter."

[2] Federal law recognizes the power of an LFA to approve transfers but imposes certain regulations governing this process. One such regulation, promulgated by the Federal Communications Commission ("FCC"),

paying might impact the level and cost of service to constituents in the franchise service area; the County thus sought further detailed information from Charter. Charter complied but later balked when the County sought still more information. When it became clear that Charter would not provide the additional information, the County Board formally decided, without prejudice, to withhold consent to the change in Charter's ownership. The County made detailed findings in support of its decision. When subsequent efforts to resolve the dispute failed, Charter, CCI, and Allen filed suit in district court. Having lost in district court, the County now appeals the district court's two principal conclusions: first, that the County unreasonably withheld consent and, second, the award of attorney's fees to Charter.[3]

II. STANDARD OF REVIEW

The district court's findings of facts are reviewed for clear error and its legal conclusions are reviewed de novo. *Dolman v. Agee*, 157 F.3d 708, 711 (9th Cir. 1998). Mixed questions of law and fact are generally reviewed de novo, *Diamond v. City of Taft*, 215 F.3d 1052, 1055 (9th Cir. 2000), although to the extent that a mixed question presents an "essentially" factual inquiry, then review is for clear error. *Koirala v. Thai Airways Int'l Ltd.*, 126 F.3d 1205, 1210 (9th Cir. 1997). Because the ultimate question is whether the

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requires the use of a specific form, Form 394, to be used to seek approvals from franchising authorities. *See* 47 C.F.R. 76.502.

[3] Charter contended at trial that the County acted unlawfully, and therefore unreasonably, in its attempts to gather information beyond what was permitted by Section 617 of the Cable Act and the FCC regulations. The district court agreed with Charter. We do not. As we explain in the analysis, the district court's obligation was to review the legislative findings of the County in its Denial resolution and to examine whether substantial evidence supported any one of the reasons offered by the County. Because the record substantially supports at least some of the reasons offered by the County, we see no reason for either the district court or this panel to reach the issues regarding the Cable Act.

County could reasonably have denied its consent under the circumstances, a mixed question arises; this question is not an "essentially factual" inquiry, though, and therefore this panel assesses the district court's conclusions under the de novo standard.

III. SUMMARY OF ARGUMENTS

The County's Position

The County contests the district court's application of the standard of review during the bench trial, as well as the First Amendment-related decisions. The County's theory on appeal is that under its state law contract claim, Charter must show that the County acted arbitrarily or without evidentiary support in carrying out its legislative function by denying consent. The County relies upon a long line of authorities requiring reviewing courts to accord legislative determinations proper deference. It argues that: instead of showing deference, the district court undertook its own independent review, and in making its decision, the district court erred in interpreting the Cable Act of 1992 as precluding the County from making these kinds of inquiries of a transfer applicant; to compound error, the district court, after finding for Charter under the contract claim, addressed constitutional claims that appear to have been unnecessary for resolution of the case; once it addressed the constitutional claims, the County asserts, the district court misapplied the appropriate standard and then held that the County's cable ordinance was unconstitutionally vague, despite Charter's prior waiver of any objection to the ordinance.

Charter's position

Charter's argument is that the County was entitled to request only reasonable information, and because the information the County was seeking went well beyond what the law permitted, the County acted unreasonably in propounding its requests and denying its consent on the basis of not having received answers to its requests. Charter also

accuses the County of improperly conditioning its consent upon illegal fees or concessions: *e.g.*, a $500,000 mitigation fee, pre-funding for a due diligence survey, and a long-term rate freeze. Because its expression was curtailed by the regulation of the cable franchise, Charter argues that the County's behavior amounts to a violation of the First Amendment.

IV. ANALYSIS

We begin by focusing on the central question: was the County's denial of consent unreasonable? The district court said yes, finding that the County's denial was unreasonable and unlawful under the contract, the First Amendment, and the Cable Act and its FCC implementing regulations; consequently, the County's decision to deny consent was an *unreasonable* withholding of consent, thus constituting a material breach of the Franchise Agreement, which only allows for reasonable withholdings of consent. In reviewing the district court's judgment, we must answer a preliminary question: is the County owed any deference to its determinations of what is reasonable under the circumstances?

Deference

[1] The franchise agreement at issue places the discretion to approve the transfer in the County's hands. When reviewing disputes emerging from this franchise agreement, a court must determine whether the County could have deemed it reasonable to deny consent; this is a much more forgiving standard than whether the district court judge would have denied consent himself if he were acting as the County's agent.

We note that in assessing the reasonableness of the County's decision, we are reviewing a discretionary decision of the County Board of Supervisors, a legislative body. As Charter concedes, grants, renewals, and consents to rate increases are all legislative acts "because they involve policy

decisions regarding the terms and conditions of the use of the public rights-of-way." Charter cites no case law for the proposition that consents to transfers are treated differently, *i.e.*, less deferentially, by courts. It argues that the County merely administers a contract in consenting to a transfer of ownership.

This characterization is wrong. As the County points out, if renewals are legislative, even though they involve the evaluation of a known entity, a transfer of ownership should, a fortiori, be viewed as a legislative action also, since the County must assess "a new entity operating under different financial and management circumstances." Moreover, the agreement between the parties incorporates the County Cable Ordinance, which, as a legislative act, operates for the benefit of all in the County.

[2] The County's position is further strengthened by case law indicating that a county's discretion is not limited by an agreement that contemplates future discretionary approvals. *See Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors*, 84 Cal.App.4th 221, 227, 233 (2000). A government's discretion is treated deferentially by courts especially when its requests for information are necessary to evaluate an application for government privileges; a denial of that privilege is hardly arbitrary when a government's information request is refused. *Gifford v. City of Los Angeles*, 88 Cal.App.4th 801, 806 (2001). This is not to say that government bodies can elicit information of any kind or any quantity, but that the discretion within which the government operates is broad.[4]

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[4] Even if we viewed the County Board's action here as an administrative matter, rather than a legislative one, deference is owed under traditional administrative law principles. Seen in this way, whether the County denied consent reasonably is a question governed not by a preponderance of evidence standard, but rather a substantial evidence test. *See In re Van Ness Auto Plaza*, 120 B.R. 545, 546 (Bkrtcy. N.D. Cal. 1990), *cited with approval in Ferrari N. Am. Inc. v. Sims (In re R.B.B.*

[3] The structure and substance of the district court's decision render apparent that no such deference was accorded; rather, the district court failed to address many of the reasons proffered by the County. Instead of merely asking whether the County's reasoning was fairly debatable, the district court substituted its judgment for the County's. Precedent, however, commands that courts should not stray from a deferential standard in these contexts, even when First Amendment rights are implicated through secondary effects. *See City of Los Angeles v. Alameda Books*, 122 S. Ct. 1728, 1736 (2002) (local government may, in furtherance of substantial governmental interests, rely on evidence "reasonably believed to be relevant"); *see also Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996) (the government's "interest in being free from intensive judicial supervision of its daily management functions [requires that] . . . deference is therefore due to the government's reasonable assessments of its interests"); *One World One Family Now v. Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996).

[4] Under this deferential standard, the County's denial of consent should be upheld as long as there is substantial evidence for any one sufficient reason for denial. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (attacks on legislative arrangements have burden of refuting each conceivable basis that might support it); *Desmond v. County of Contra Costa*, 21 Cal.App.4th 330, 336-37 (1994) ("As long as the Board made a finding that any one of the necessary elements enumerated in the ordinance[ ] was lacking, and this finding was itself supported by substantial evidence, the Board's denial of appellant's application must

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Inc.), 211 F.3d 475, 477-78 (9th Cir. 2000) ("withholding of consent is reasonable if it is based on factors related to the proposed assignee's performance as a dealer and is supported by substantial objective evidence."). The *Van Ness* court also noted that in determining the suitability of transfers of franchisees, courts ought to "be somewhat cautious in requiring the [franchising authority] to enter into such a relationship involuntarily." *Id.* at 548-49.

be upheld."); *Saad v. City of Berkeley*, 24 Cal.App.4th 1206, 1214 (1994) ("The burden is on the petitioner to show there is no substantial evidence whatsoever to support the findings of the board."). The district court did not examine whether all of the reasons detailed in the County's extensive Denial Resolution were spurious or unlawful. This was mistaken. *Cf. United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.") (internal citation omitted).

[5] We must therefore examine whether any one of the reasons offered by the County Board in its decision and attached exhibits survives scrutiny under a deferential standard.

Was There Sufficient Basis for the County's Decision to Deny Consent Without Prejudice?

[6] The County's Denial Resolution explained its decision to deny consent based on various factors. One was Charter and Allen's failure to affirmatively demonstrate financial qualifications to operate a cable system. In its submissions, Charter offered Paul Allen's personal "balance sheet" as evidence for his financial qualifications to take over the obligations of the franchise. However, at no time were Allen's personal assets contractually pledged in support of performance of the franchise obligations. The ability of a cable operator to adequately service the franchise throughout its term is a legitimate concern. But the district court did not address this concern or the testimony of a financial expert who testified that the materials submitted by Charter were insufficient to answer questions about liquidity or to

determine Allen's true net worth.[5] Instead, the district court conducted its own analysis, announcing that in light of Allen's substantial wealth and the equity-only nature of the deal, his financial qualifications were incontrovertibly established.[6] We conclude that it was not unreasonable for the County to be concerned about Allen's true net worth and about the relationship of that wealth to the viability of the enterprise.[7]

[7] The district court also failed to give deference to the County's articulated concern for keeping stable the subscriber rates in the future. Allen's offer, based on a per subscriber basis, was incontrovertibly and substantially higher than the market price. A high price might imperil the possibility of achieving a reasonable return on equity and thereby jeopardize the company's financial health, the stability of rates, and the quality of service. Fear of this high price then is also a legitimate concern. Nonetheless, the district court rejected this concern, reasoning that the "normal" fear would be whether there would be enough cash flow to service debt, and because there was no debt, there was no cause for concern, and therefore no cause for the information requests that would generate reliable inferences about prospective rates of return. *Charter*, 133 F. Supp. 2d at 1211.

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[5] Charter claims that this expert was discredited on cross-examination, but the district court did not find this to be the case.

[6] Charter's briefs do not even mention, let alone adequately respond to, the issue of whether Allen's wealth was contractually obligated. In so doing, Charter makes the same error the district court did: ignoring a justifiable reason identified by the County as the basis for its decision.

[7] We also observe that Charter had itself commissioned a privately-prepared due diligence study that would have satisfied virtually all of the County's requests for information. At argument, the County's lawyer said that had Charter turned over that study, instead of petulantly drawing a line in the sand, it would have sufficed. The County only found out about the study during discovery.

Experts from both sides, however, testified that rates of return on equity are key factors in analyzing transactions of this type. This suggests that the County's concerns were reasonable. In a world where cable operators have scaled back franchises because "the initial franchise was economically unviable," House Rep. No. 98-934 at 21, *reprinted in* 1984 U.S. Code Congressional & Administrative News at 4659, and where courts have in the past held that it would be unconstitutional for a government to prevent a utility company from collecting a constitutionally reasonable rate of return on their investments, *see Michigan Bell Telephone Co. v. Engler*, 257 F.3d 587, 596 (6th Cir. 2001), it could hardly be unreasonable for the County to be worried about the long-term viability of the Allen purchase and its effects on the County's responsibility to assure a stable cable franchise for its citizens.[8] Nonetheless, the district court decided due diligence was improper, largely because few other local franchising authorities undertook this review. But as the amicus brief submitted by a host of local franchising authorities (LFAs) and the National League of Cities points out, this kind of due diligence does not typically occur, not because it is unnecessary but because the limited resources of local governments often prevent such scrutiny.

[8] The County government, serving as steward of the public good, is entitled to be properly concerned about the long term consequences of a significantly above market-value purchase of a cable provider. While it is true that under the then-current FCC rules, Charter would not have been able to raise rates on this basis, those rules are subject to change; indeed, the rules have already been amended and may be amended again. *See* Brief of County Amici at 16-17.

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[8] *Compare Guntert v. City of Stockton*, 43 Cal.App.3d 203, 215-217 (1974), where the reviewing court found that the city acted *arbitrarily by failing to attain enough information* about the financial viability of a developer.

[9] The concerns we have highlighted here, which were articulated by the County in its denial of consent, were sufficient to justify the County's decision. Although we do not endorse every drib and drab of the County's actions during its negotiations with Charter, we cannot say the County acted without a rational basis or without substantial evidence for its decision to deny consent without prejudice. We therefore reverse the district court's judgment on these grounds and vacate its decision. We note that even if we thought the County had acted unreasonably, our view would be deferential not only because precedent so commands, but also because methods exist to promote self-correction in the future: citizens can vote out their local representatives and cable operators can refuse to enter into franchise agreements with notoriously difficult LFAs.

Charter attempts to persuade us of the County's bad faith behavior by pointing to the County's apparently unusual request that Charter fund and have prepared a due diligence study. But the relative oddity of this precaution is not of much moment given the deference accorded to legislative actions. More to the point, merely because the request is inconsistent with custom does not mean that it is in anyway unreasonable—think of Judge Hand's famous opinion in *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (because an entire industry may be negligent, industry custom is only some evidence of what is reasonable).

[10] Finally, since the County's judgment was reasonable, it necessarily follows that its decision to deny the transfer on the basis of that judgment was supported by a legitimate governmental interest. Charter voluntarily entered into an agreement under which the County had to approve any transfer of the franchise, and thus, to that extent, waived its right to claim that a denial of a transfer violated its First

Amendment rights.[9] We therefore need not reach the other issues addressed by Charter and the district court.

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[9] Our Court has expressly recognized that "First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent." *See Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) ("If the Union felt that First Amendment rights were burdened by [the contract provision], it should not have bargained them away and signed the agreement."). Our Court will not enforce a waiver "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.* That circumstance does not apply here, as public policy favors the government's decision to be careful in its role as steward. Moreover, in a case like this one, where sophisticated parties are represented by counsel, we think Charter was aware of what it was getting itself into. *See Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1314 (8th Cir. 1991) (waiver of constitutional rights can be implied from terms and conditions of a contract where party claiming right is sophisticated and represented by counsel; "Cablevision forgets that it bargained for its franchise agreement. Cablevision voluntarily entered into the franchise agreement, presumably for its own economic gain. The

V. CONCLUSION

The district court's judgment on the underlying dispute is reversed. Our decision moots the district court's award of attorney's fees to Charter. The district court's decisions in both cases under review here are vacated.

REVERSED.

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forum for protecting its free speech rights was the bargaining table, not the courtroom . . . .").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-01874 WHA

CHARTER COMMUNICATIONS, INC., a Delaware corporation; CHARTER COMMUNICATIONS PROPERTIES, LLC, a Colorado limited liability corporation; PAUL G. ALLEN, an individual,
Plaintiffs,

v.

COUNTY OF SANTA CRUZ,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER BENCH TRIAL

INTRODUCTION

In this case of first impression concerning the application of the 120-day rule under Section 617 of the Cable Television Consumer Protection & Competition Act of 1992, 47 U.S.C. 537, the issue is whether the County of Santa Cruz, California, unlawfully and unreasonably refused to consent to a change in ownership for the local cable franchise. Also presented is the question whether its refusals violated the First Amendment.

PROCEDURAL HISTORY

This action commenced in early 1999. On November 12, 1999, the Court granted in part and denied in part the County's Rule 12 motion, dismissing plaintiffs' takings claim as unripe and their direct claims under Section 617 of the

1992 Cable Act, 47 U.S.C. 537, for lack of a private right of action. Plaintiffs were allowed to proceed on their claim for infringement of their constitutional free-speech rights under 42 U.S.C. 1983 and their contract claim to enforce a franchise agreement promise not to "unreasonably refuse" to approve such transactions, a claim that indirectly takes into account any violations of the 120-day rule. *Charter Communications, Inc. v. County of Santa Cruz*, 74 F. Supp. 2d 937 (N.D. Cal. 1999). On January 11, 2001, the Court denied cross-motions for summary judgment. A bench trial began in late January. The trial concluded on February 15, 2001. The Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The parties have submitted voluminous proposed findings, and the Court has considered all of them. In the interest of clarity, however, this order focuses on the essentials. A number of proposed points, while arguably relevant and accurate, have been omitted as too distracting. That a finding has not been incorporated into this order does not mean that the Court rejected its accuracy. This order will cite the record as the exception and not the rule. For some exhibits, page cites are to the original page numbers and for others to Bates numbers, as convenient.

The Parties

1. Formed in 1992, Charter Communications, Inc. ("CCI"), has been at all relevant times in the cable-television business, providing service through one or more operating subsidiaries, including Charter Communications Properties, LLC ("Charter"). The latter acquired a group of cable businesses in California in 1997-98, one of which operated in Santa Cruz County, namely, the so-called "south county franchise," covering unincorporated areas surrounding the cities of Capitola and Watsonville. By 1998, CCI was a nationally-ranked cable operator and had acquired 22 cable systems in the United States. In 1998, Paul G. Allen

purchased CCI, including its subsidiaries, in a $4.5 billion nationwide transaction. Mr. Allen was the co-founder of Microsoft Corporation and is wealthy. He paid cash for the Charter stock. Mr. Allen, CCI and Charter are the plaintiffs herein. They sued Santa Cruz County when it refused to approve the change in control for the local franchise in question. Whether that refusal was reasonable and lawful is the question presented. The County is the sole defendant.

The History of Cable in Santa Cruz County

2. Topography has long made cable important in Santa Cruz County. The area is surrounded by mountains that block reception of over-the-air signals from major metropolitan areas such as San Jose and the Bay Area. Until recently, the quality of service of cable providers in the area has lagged behind other parts of the country.

3. To operate a cable business in Santa Cruz County, it was (and remains) necessary to obtain a franchise from the local franchising authority, as elsewhere in the United States. Here, that franchising authority was the county government. From time to time, the county government had been frustrated over the cable service in the area. In dealing with cable operators, the County had even been threatened with termination of cable services. At least one operator told local officials that it could not continue providing services due to financial stress.

4. One troublesome prior operator was Sonic Cable Television. Prior to May 19, 1998, it had the south county area. Its franchise had actually expired in or about 1982, but thereafter Sonic had continued to operate as a holdover tenant. Under its franchise, the County's consent was required for a transfer of ownership (TX 3).

The Charter/Sonic Transaction

5. In 1997, an opportunity arose to improve conditions for the franchise. On August 19 of that year, Charter

purchased Sonic's cable assets, including the south county operation. The Charter/Sonic transaction involved over forty cable television franchises located in two states, serving over 100,000 subscribers. Although the Charter/Sonic transaction is not at issue herein, it serves as important foundation, both sides assert, for the events that followed a few months later in the transaction that is at issue. By way of prelude, consequently, the following findings have relevance.

6. In September 1997, Charter and Sonic requested the County's consent to the transfer of the franchise. Federal law recognizes the power of local franchising authorities to approve or disapprove transfers but imposes certain restrictions discussed hereinafter. The FCC has promulgated a specific form to be used to seek approvals from local franchising authorities called Form 394. 47 C.F.R. 76.502. In the Charter/Sonic transaction, the parties submitted a Form 394 plus attachments to the County, which then requested and received additional voluminous supplemental information.

7. In the consent process, two individuals were the main actors for the County. One was Mr. Pat Busch, the assistant county administrative officer. He was schooled in cable issues. The County also retained Attorney William Marticorena, a private lawyer in Costa Mesa, California, to act as its special counsel. Mr. Marticorena was a graduate of Harvard Law School and specialized in cable law. For Charter, the individual primarily involved was Ms. Trudi Foushee, a vice president and senior counsel of the parent company CCI. All three were later leading actors in the CCI/Allen transaction. All three testified at trial.

8. The County was advised that CCI, the parent company, would manage the south county franchise area and was provided with information concerning CCI's technical qualifications to do so. The County did not ask for copies of employment contracts for CCI personnel or other evidence that CCI senior management would remain in place. The County did not ask any questions regarding the technical or financial qualifications of individual shareholders of CCI, or

for a guaranty by individual shareholders, or for individual employment contracts. These omissions arguably stand in contrast to affirmative inquiries made by the County in the later CCI/Allen transaction.

9. Two of the items provided to the County were a five-year projected income statement for Charter nationwide and a ten-year projected income statement for Charter allocated specifically for Santa Cruz County (TX 58 and TX 60). These projected income statements contained projected capital expenditures, including rebuild costs, and a footnote explaining how revenue, expense and capital items were allocated. The County did not ask any questions regarding the revenue-growth assumptions used therein.

10. Through Mr. Marticorena, the County served Charter with extensive information requests. After the County served on Charter its second information request (TX 30), the discussions shifted to what concessions the County wanted. Messrs. Busch and Marticorena made clear that any grant of a cable franchise to Charter would have to include, *at a minimum*, the following: (a) a commitment by Charter to construct or rebuild a state-of-the-art cable system (750 MHZ, two-way system), which would ensure a minimum of 61 channels; (b) an immediate reduction of existing subscriber rate levels plus a rate freeze until the system rebuild was completed, plus significant restrictions on Charter's ability to increase rates in the future; and (c) cash payments for what the County believed had been franchise violations by Sonic. The proposed rate order would have limited Charter's ability to increase rates as might otherwise be permitted under the applicable FCC rate regulations. Charter demurred.

11. Mr. Busch then sent Ms. Foushee a "draft staff report" and draft county board resolution recommending denial of the transfer (TX 20). Among other things, they stated that Charter had failed to provide critical information regarding its ability to receive an acceptable rate of return and that Charter did not have the qualifications to own or operate the cable system. Viewed in the overall context of the

negations [sic], it seems clear that the County utilized the threat of a denial as a way to get Charter to accept its demands.

12. In the face of this threat, Charter acquiesced. An agreement resulted. On or about May 19, 1998, the County's board of supervisors adopted a resolution approving the transfer to Charter (TX 3). The parties entered into the following, which reflected various conditions imposed by the County for its consent: (a) a new franchise agreement; (b) a rate order; and (c) a transfer agreement.

13. The hard bargain was excellent for the County. The new franchise agreement required Charter, among other things, to construct, within 24 months, a two-way state-of-the-art cable system, and to offer a 61-channel "basic service tier," including 23 channels not previously available. It further required Charter to put up a $500,000 letter of credit and a one-million-dollar performance bond. It also provided for the County's recovery of liquidated damages of up to $2,500/day for material breaches (TX 3).

14. The rate order had, and still has, the effect of restricting Charter's ability to increase rates that might otherwise be permitted under applicable FCC rate regulations (TX 3 at 1864-71). The rate order included provisions requiring a basic-service rate plan which provided for an immediate rate reduction to subscribers, a ten-percent discount for low-income senior citizens and the disabled, a rate freeze for approximately two years during completion of the rebuild, a low "basic service rate" when the system rebuild was completed, lower than Sonic's former rates, on a per-channel basis, and a provision restricting Charter's ability to increase rates thereafter to the greater of either (a) 95% of the increase in basic service rates (weighted by system and by tier) in Los Angeles and Riverside systems (where there was "intense over the air competition") owned and operated by Charter entities or (b) 95% of the TCI regulated basic service rates, plus $2.00 (TX 3 at 1864-65). Another effect of the rate order was that Charter was required to maintain its "cable

programming service tier" as a part of the "basic tier," and to waive the federal deregulation of the "cable programming service tier" that went into effect in 1999. As a result, the County has further regulated an area of cable services that is not normally regulated in the country.

15. Piling guarantees on assurances, the transfer agreement finally included a further unconditional guarantee by parent CCI of Charter's performance of its obligations under the franchise agreement and County ordinance, and included an agreement to pay the County $75,000 (TX 3 at 1852, 1858). It also provided that a breach of the rate order or the transfer agreement would constitute a breach of the franchise agreement. The transfer agreement set forth, among other things, (a) a specific requirement that Charter submit a cost-of-service filing to the County, (b) the parties' agreement, in advance, to the County's adoption of the rate order (which, in the interim, Charter agreed to treat as a valid mutual contract), (c) Charter's waiver of any right to challenge or appeal the rate order, (d) Charter's agreement to accept the rate order as a lawful and fully binding cost-of-service rate order, (e) Charter's agreement to waive any right to file any further cost-of-service forms for the remainder of the franchise term (TX 3 at 1855-57).

16. At trial, the County asserted that the draft denial report had been no threat at all, but was legitimate ambivalence. It advanced reasons for its sending the draft and then reversing course. For example, the County knew, it claims, that Sonic had been levying a bogus possessory interest tax on its bills and collecting it from subscribers, even though no such tax in fact existed. The County also argued it had discovered that the acquisition would be routed through a Norwegian company. These were, the County claims, the real reasons for the denial recommendation. These were marginally plausible considerations. Ordinarily, a court should give the benefit of the doubt to the County on this point. Considering all the evidence and considering carefully the entire course of conduct, however, the Court finds that

these considerations were make-weights and that the real reason for the denial recommendation was to use the County's power to deny as a basis for extracting concessions illegal under federal law, particularly as to the rate order. This also explains why Mr. Marticorena and Mr. Busch insisted on the extraordinary waivers in the final language, acquiesced in by Charter.

The CCI/Allen Sale

17. With the foregoing history, we now turn to the transaction at issue, which followed the foregoing by only a few months. On July 29, 1998, Paul G. Allen contracted with CCI and others to purchase approximately 94% of the outstanding shares of CCI and certain of its affiliates as part of an approximately $4.5 billion acquisition (approximately $2.26 billion in cash and $2.2 billion in assumed debt) that would (and later did) result in a common ownership of all cable properties then managed by CCI under a single umbrella company. As a result, the ultimate corporate control of Charter was held by Mr. Allen, as the new majority shareholder of CCI.

18. Through the CCI/Allen transaction, Mr. Allen acquired controlling ownership interest in legal entities holding over 473 cable television franchises in eighteen states, serving over 1.2 million subscribers and more than 38,000 plant miles of coaxial and fiber-optic cable. In addition to being a co-founder of Microsoft, Mr. Allen was a director of various technology-related companies involved in the development of new technologies and the deployment of new services.

19. On July 30, 1998, Charter and CCI notified the County of the transaction and represented that CCI's existing senior management would continue as the senior management of the newly-consolidated companies. Charter, CCI and Mr. Allen requested the County's consent to the change of control. Consent was required under the local cable ordinance, incorporated into the franchise agreement, but could not be

"unreasonably withheld," a phrase that is the crux of the case (TX 2 at 900). They submitted an FCC Form 394 with attachments on August 18, 1998 (TX 6).

20. The cover letter from Charter's president and CEO, Mr. Jerald Kent, stated in part (TX 6 at 0762):

> You will be pleased to know that there will be no increase in debt-to-equity ratios of the entities as a result of this transaction. Mr. Allen will assume the current debt and in many instances liquidate some debt instruments. Notwithstanding the consumer benefit of this transaction, the effect of this transaction on you and your subscribers should be transparent for the most part. The current corporate staff and system management will remain under my leadership. And of course, Charter will retain its commitment to superior customer service.

21. The materials provided to the County as part of the Form 394 submissions supported the following facts:

(a) As a result of the transaction, Mr. Allen would become a majority shareholder and a chair of Charter's corporate parent, CCI.

(b) Following the close of the transaction, Charter (and not Mr. Allen or CCI) would continue, as before, to be the legal entity holding the franchise for the south county franchise area with no change in Charter's obligations thereunder.

(c) Charter would still be the legal title holder for the cable system serving the south county franchise area.

(d) The transaction was to be financed from Mr. Allen's personal assets, required no new debt to the Charter or CCI entities, and would not result in any increase in the debt to equity ratios of either Charter or CCI. In fact, the submission stated that Charter's existing debt would be reduced by $34 million.

(e) Charter and CCI had substantial experience owning and operating cable systems, and the management of the systems was to remain under Mr. Kent's personal direction.

(f) Mr. Allen and the sellers were contractually required (assuming the other conditions were satisfied) to close the transaction, if and when consents to the transfer of control had been obtained from local franchising authorities of franchises representing ninety percent of the total number of subscribers of the Charter entities, taken as a whole. Any delay of the closing past December 31, 1998, required a $100,000,000 reduction of the purchase price.

(g) Mr. Allen had fabled wealth and sufficient assets to close the transaction and to operate the nationwide system including the south county franchise area.

22. In sum, the transaction was structured without any increase in the debt-to-equity ratios of the Charter entities, CEO Kent represented he and other management would remain in place, and the previously-negotiated rights and obligations of the parties remained the same. The applicants simply wanted approval of the new majority shareholder.

The County's Response

23. One of the key issues in this case is whether it was lawful for the County to respond to the change-of-control request by launching a wide-ranging investigation into what Mr. Allen might or might not make as a return on his stock investment in CCI over the years and whether he would eventually have incentives to try to increase rates and cut services. The County insists that its concern arose out of the fact that Mr. Allen seemed to be paying a high price for the nationwide enterprise, *i.e.*, a price at the high end of the market (or higher) for cable systems in general. If so, the County claims it feared Mr. Allen would cut back on local

service or try to increase local rates as a way to earn an "acceptable" rate of return. In contrast, plaintiffs contend that these fears were fanciful and mere pretexts for a hold-up, *i.e.*, the manufacturing of false or exaggerated concerns to trade off later for monetary or other illegal concessions.

24. In this context, the same teams acted for the parties as before. Mr. Marticorena and Mr. Busch were the primary bargainers for the County. Ms. Foushee negotiated for Charter.

25. Out of the approximately 497 local franchising authorities who received FCC Form 394 applications in connection with the CCI/Allen transaction, no more than ten percent requested additional information. Of those franchising authorities that did request additional information, the ones jointly represented by Mr. Marticorena, including Santa Cruz County, propounded the most lengthy requests. His was the only information request that sought information to determine what rate of return Mr. Allen would receive on his equity investment.

26. The Santa Cruz cable system had sold only months before (during the Charter/Sonic transaction) for a price of approximately $1,564 per subscriber, according to the Kagan financial data book, an industry publication read and relied on by those in the cable business. In contrast, the price per subscriber for the CCI/Allen transaction, as indicated in the Kagan financial data book, was $3,600. According to the Kagan financial data book, the $3,600 value per subscriber established for the transaction was the highest or most expensive price paid for any franchise nationwide. Also, the cash-flow multiplier for the CCI/Allen transaction was higher than industry averages at the time. The cash-flow multiplier for the transaction as indicated in the Kagan financial data book was fourteen, the highest cash-flow multiplier reported in 1998. This data was published by the time of the events in question.

27. Although it came to light only during discovery herein, a pre-transaction due diligence study prepared privately for Mr. Allen showed the same conclusions. It stated that the price for CCI was "above the high end" of the range of prices of comparable cable systems and that the purchase price per subscriber for the CCI/Allen transaction was the highest purchase price of any cable transaction in 1998, and one of the highest ever. It placed the cash-flow multiplier at fourteen as well. This study was done by NationsBanc Montgomery Securities and will be referred to herein as the NMS report (TX 65).

28. Up to a point it would have been reasonable, therefore, to wonder, based on reliable industry sources, whether Mr. Allen was paying somewhat more than market value for the national cable system. It is true that a counter argument can be made, as Charter does, that Mr. Allen paid substantially less for the Charter subpart of the acquired enterprise (TX 55). Still, it was not unreasonable for the County to rely on the Kagan data. Whether, however, that concern should have translated into the far-ranging investigation that developed is a different question.

The Demand for a Due Diligence Study

29. Under FCC regulations, the Form 394 submission was "complete" as filed and the County has never contended otherwise. And, the Form 394 submission was thorough compared to the general practice in the cable industry. The FCC Form 394 materials submitted for the CCI/Allen transaction specifically informed the County that it had 120 days under FCC regulations (47 C.F.R. 76.502) to take action on the transfer application (TX 10).[1]

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[1] It is because of Charter's express reference to the County's having 120 days to act that Charter must be deemed to have waived (or to be estopped from asserting) the shorter sixty-day deadline set by the local ordinance (TX 2 at 900).

30. The first response by the County occurred on August 26, 1998, as part of a group response by six LFAs. On that date, the County's special counsel, Mr. Marticorena, met with Charter on behalf of the County and five other franchising authorities in California represented by him. No other County representative was present. Charter was represented by Ms. Foushee.

31. It must be emphasized that this meeting and subsequent negotiations until December 1998 proceeded on a "group LFA" basis, *i.e.,* Mr. Marticorena acted for six California local franchising authorities with respect to the parallel change-of-control requests pending before each on the acquisition. At no time before December 1998 were there any specific communications limited to Santa Cruz County (except, of course, the initial Form 394 filing). Neither party ever objected to proceeding in this manner. Both sides evidently felt it was more efficient to proceed on a "group LFA" basis. For this reason, plaintiffs' argument that the County should have, on its own, pored over the earlier Charter/Sonic transaction filings in order to find answers to its CCI/Allen questions is simply unfair. Mr. Marticorena was acting for a group of LFAs. The entire group did not have the Charter/Sonic information. Prior to December, Charter never made reference to any Sonic filings as having the information requested.

32. During the August 26 meeting, Ms. Foushee explained the CCI/Allen transaction. She asserted that the CCI/Allen transaction would not affect rates. She further explained that, unlike many other transactions, because the transaction was required to close by year-end 1998, Charter and CCI could not agree to extensions of the time for the franchising authorities to complete their review of the consent requests. She stated that the Form 394 was complete and provided more than sufficient information.

33. During the meeting, Mr. Marticorena. requested that Charter and Mr. Allen agree to pre-fund *(i.e.,* pay in advance) the costs of a "due diligence study" to be performed by a

consultant hired by him to address the financial feasibility of the proposed transaction and the impact of the transaction on future rates. The consultant was William Morgan of Diehl, Evans & Co., LLP. He had performed at least one prior due diligence study for Mr. Marticorena.

34. At no time did Charter ever affirmatively agree, either at the meeting or thereafter, to provide or to fund such a report, or that it would be necessary, reasonable or lawful to require Charter to perform or fund such a report as a condition for its consent. Ms. Foushee, however, said she would "consider" the request. In follow-up conversations, Ms. Foushee equivocated. Although she told Mr. Marticorena that such a study was unnecessary, she also said that if one was going to be done, it should be done by someone other than Mr. Morgan, who she said was biased in favor of Mr. Marticorena. Asked to submit the resume of an alternate candidate, she said she would but never did.

35. Prior to Mr. Marticorena's request, neither Charter nor CCI had ever been asked to pay for a consultant to review its books and business plan to see if a transaction was economically viable or even to participate in or cooperate with such a study. Such a request was inconsistent with the practice and custom in the cable industry for transfers or changes of control.

36. Under the terms of its franchise, Charter was (and remains) required to pay a five-percent franchise fee to the County, the maximum fee permitted by federal law (TX 3 at 1798). The County could have used the franchise fee paid by Charter to fund a due diligence study if it had chosen to do so.

37. These findings will return to the story of the proposed due diligence study but, to maintain events in approximate chronological order, we must now turn to the so-called first information request.

The First Information Request (September 1)

38. On September 1, Mr. Marticorena mailed Ms. Foushee a massive information request, sometimes referred to herein and by all parties as the "first information request" (TX 8).

39. The letter was nine pages long, single spaced. It requested seventy items, including subparts. The specifics show that Mr. Marticorena spent little or no time actually reviewing the Form 394 submissions before sending the letter (TX 6) or trying to determine the applicability of the questions to the actual deal. Instead, he printed out admittedly boiler-plate information demands. For instance:

(a) The first fifteen standardized questions (TX 8 at ¶¶ 2-5) related to the impact of the transaction on future cable rates and whether plaintiffs would seek to use the acquisition costs to justify future rate increases. Even the County concedes these were form inquiries with little or no application to the problem at hand.

(b) Many of the other questions referred to "lenders" and "credit facilities" despite the fact that the Form 394 submissions and Ms. Foushee's August 26 meeting with the County's special counsel made clear that no such loan agreements were to be employed.

40. Beyond this, the request was broad and burdensome, asking, for example, for "any and all agreements . . . or any other document which exists in the hands of Charter, Paul Allen, or any related entity, or both, regarding the System or Transfer" (TX 8 at 6), *i.e.*, asking for every sliver of data on the deal. The letter stated that the LFAs were "concerned whether the Transfer, considering its totality of its economic impacts, will preclude or impede Charter from realizing a reasonable return . . ." (TX 8 at 1).

Charter's Supplemental Information

41. On September 17, 1998, Charter responded with a two-inch thick, written response with back-up documents (TX 10). These materials included financial statements, ten-year projected income statements, information on the cable systems in which Mr. Allen then owned a controlling interest, an explanation of Mr. Allen's anticipated role in the company, and information on the calculation of the acquisition price (TX 10). These materials included, among other things, (a) further assurance that no new debt would be incurred by the Charter corporate entities in order to finance the transaction, (b) information that Charter's debt would, in fact, be reduced by approximately $38 million, and (c) a reassurance that the purchase price would not and could not, under federal rate regulations, be used to justify a later increase in regulated rates. Regarding the latter, the submission stated:

> Finally, as noted above, as Charter understands the applicable FCC rules, the recording of acquisition-related intangible assets for accounting purposes in connection with the pending acquisition will not have any impact whatsoever on the Form 1220 maximum permitted rate for the franchises at issue here, for the simple reason that the pending acquisition is taking place after May 1994.

(TX 10 at 1147.)

42. During the trial, plaintiffs further contended that the County should not have been concerned over rate increases because of the rate order (from the Sonic deal). During the communications at issue, however, plaintiffs never so asserted. The reason seems clear. As stated, the parties proceeded to deal with one another on a "group LFA" basis. It would have been pointless to refer the other LFAs to information solely in the files of Santa Cruz County. Nonetheless, as stated, Charter and CCI did make clear that they viewed the FCC regulations as proscribing any attempt

to pass on acquisition costs in excess of the net asset value to consumers in the form of rate increases.

Mr. Marticorena's Written Proposal for a Due Diligence Study

43. Meanwhile, on September 9, Mr. Marticorena, sent to Charter a proposal for a due diligence study by Mr. Morgan (TX 12). The study was to be performed for the group of LFAs, including Santa Cruz County. The proposal detailed categories for analysis and investigation, including inquiries into comparable industry transactions. The alleged need for the study was that Mr. Allen had proposed acquiring Charter at 14 times 1999 estimated operating cash flows. Conceding that there might have been valid business reasons for this purchase price, the proposal professed worry that it might lead to pressure on Charter to push cable rates up to justify the price paid for the company (TX 23 at 1114). The proposal would have required making ten-year financial projections with two weeks of on-site field work at CCI's St. Louis headquarters and Mr. Allen's Bellevue offices, in part to assess their "business plans," followed eventually by draft and final reports. The estimated fee was $39,000 (TX 23).

44. On September 15, Mr. Marticorena met with Ms. Foushee to discuss, among other things, the Allen transaction (as well as a separate pending cable acquisition). During the meeting, Mr. Marticorena again brought up his request for Charter to pre-fund a "due diligence study." He also provided Ms. Foushee with an additional copy of Mr. Morgan's proposal. She said she would get back to him.

Mr. Marticorena's Follow-Up Letter (October 5)

45. By October 5, Mr. Marticorena had not heard back from Ms. Foushee on the due diligence study. On that day, therefore, Mr. Marticorena sent another letter to Charter (TX 25). It reiterated a desire for plaintiffs to pre-fund a due diligence study. The letter warned that Charter's equivocation in addressing the due diligence issue could cause

delays or an adverse decision. This was a threat, in effect to refuse to process the FCC Form 394 applications.

46. Ms. Foushee received the letter. Busy with the overall deal, she did not consider it a "priority." She did not respond to the letter until November 3. In her written reply of that date (TX 24), she asserted that, although Mr. Marticorena could request information beyond that specified in the Form 394, such requests could not toll the 120-day deadline for action on the transfer application. She further stated that, on October 1, she had faxed the resume of Louis Karrison, whom she proposed to perform any due diligence study, and complained that Mr. Marticorena had not responded to the information. Through inadvertence, Ms. Foushee had not, in fact, caused the resume of Mr. Karrison to be faxed. Plaintiffs have been unable to locate any documentation confirming that the resume was faxed. Plaintiffs failed to produce any witness to confirm that the resume was ever faxed.

Mr. Marticorena's November 2 Correspondence

47. On November 2, Mr. Marticorena sent Charter two separate, detailed and lengthy demands. Both are centerpieces of the case. One concerned a demand for further additional information and will be described below. The other concerned the due diligence study. Mr. Marticorena mailed these information demands before receiving Ms. Foushee's November 3 letter. Ms. Foushee mailed her November 3 letter before receiving Mr. Marticorena's November 2 information demands. The letters crossed in the mail.

48. As to the due diligence study letter, Mr. Marticorena had no agreement to pre-fund a "due diligence study" as of November 2. To reframe his position, his letter demanded that Charter directly retain an "independent" financial consultant at its own cost to review and to opine on the company's business plans and the ability of Mr. Allen to "secure a reasonable return of and on its investment," and to generate a set of ten-year projection revenues and costs in a

detailed prescribed format (TX 12 at 1194). The letter stated in part:

> [A]lthough even market rate acquisitions present serious issues to Franchising Authorities and subscribers regarding the potential impact of those acquisitions upon subscriber rates, a transaction which appears to be priced at levels significantly exceeding those otherwise obtainable in the marketplace produces magnified concerns regarding how the Buyer will be able to secure a reasonable return of and on its investment in Charter [footnote omitted].
>
> * * *
>
> In order for the Franchising Authorities to properly analyze the economic and operational viability of the Transfer, the Franchising Authorities hereby respectfully request that the Seller and the Buyer, either individually or collectively, submit a report of an independent financial consultant (the "Independent Financial Consultant"), as defined below, which shall be prepared at the sole cost and expense of the Seller and the Buyer, which discusses, analyzes, and provides an opinion as to the reasonableness and fairness of the transaction to the parties and to consumers based on the criteria set forth below.

The "independence" of the consultant was to be measured by six stated criteria. The consultant was to perform 25 specified calculations in conjunction with a ten-year projection of revenues and costs. The letter was eight pages long, single-spaced.

49. The letter further requested documents such as:

> (a) Copies of any and all internal memoranda, reports, analyses, correspondence, financial projections or other documents prepared by the seller, or any agent

thereof, relating to the determination, calculation, negotiation or method of determining the acquisition price.

(b) Copies of any and all internal memoranda, reports, analyses, correspondence, financial projections or other documents prepared by the buyer, or any agent thereof, relating to the determination, calculation, negotiation or method of determining the acquisition price.

(c) Copies of any reports, studies, opinions, opinion letters or other documents prepared by independent parties, including but not limited to any "fairness opinions" relating to the transfer, presented to, considered by, or available to the board of directors of the seller and buyer, or any affiliate or subsidiary thereof, concerning the economic viability of the transfer, the fairness of the transfer or which will be used, in whole or in part, as a basis for any recommendation to the owners of the seller and the buyer, or any affiliate or subsidiary thereof, concerning a proposed action or vote upon the transfer.

The letter asked for the documents to be produced within ten days (TX 12 at 8).

The Second Information Request

50. The second November 2 letter was a further information request. It was eight pages long, single-spaced. It included 31 paragraphs of inquiry. It asked that Charter, among other things, justify the financial pro formas submitted earlier by Charter on September 17. In doing so, Charter was told to provide "*extrinsic* sources" to support its projections, to provide a discussion of Charter's business plan and approach for maintaining its subscriber base against competitors, and to develop a new set of pro formas showing projected capital expenditures and projected income tax payments over the next ten years (TX 11).

51. The first seven interrogatories of the letter were expressly grounded on supposed aggressive projections set forth in Charter's pro forma submissions served on September 17. These had allegedly been projecting growth at rates in excess of supposed industry trends. Paragraph 2 of Mr. Marticorena's letter, for example, stated that Charter's earlier submission had showed average annual increases of eight percent with respect to Expanded Basic Service Revenue (TX 11 at 2458). In fact, all now concede herein that annual increases had only been shown at 6.5 percent. Mr. Marticorena simply misread or mis-analyzed the data. The same was true for six other questions in this vein. Thus, the average growth in basic service revenue was not 10%, it was 7.4%; average annual growth in expanded basic revenue was not 8%, it was 6.5%; average annual growth in a la carte service revenue was not 240%, it was 41.4%; average annual growth in ancillary revenue was not 22%, it was 12.8; average annual growth in advertising revenue was not 26%, it was 14.7%; and average annual growth in total revenues was not 11%, it was 8%. No credible excuse was given by Mr. Marticorena for these material errors.

52. For the first time, the letter also requested evidence of the long-term commitment of existing management to stay with the venture subsequent to closing, as well as evidence that some portion of the acquisition price would inure to the benefit of the new company and subscribers by way of long-term retention of existing management (TX 11 at ¶¶ 6-7). The November 2 letter also sought clarification as to how the overall price had been allocated between Charter and the other acquired entities (TX 11 at ¶¶ 7-8).

Charter's Decision to Cease Providing Information

53. In mid to late November 1998, Ms. Foushee and Mr. Marticorena had a telephone conversation in which Ms. Foushee stated that Charter believed the information requested in the County's two November 2, 1998, letters was unreasonable, that Charter would not be providing further

responses, that Charter believed the County had sufficient information to act on the consent request, and that, while Charter was willing to schedule a meeting with the County and other franchising authorities represented by him to work through certain issues, the CCI/Allen transaction would close by year-end and Charter could and would not agree to extend the 120-day review period.

54. On December 1, 1998, Charter sent Mr. Marticorena two letters declining to go forward with any "due diligence study" (TX 26) and declining to provide the additional requested information (TX 13). In her letter on the information requests, she said (TX 13):

> Secondly, as we have indicated, both orally and in writing, the projections that have been provided to you are the projections which Charter had prepared prior to the Allen acquisition. The Allen acquisition will have no effect on the projected income, and only a positive effect on the debt and debt levels. To repeat, there will be no increase in debt levels in this transaction. Allen is simply purchasing all outstanding equity. No additional debt is being added to any franchise, indeed, because of Mr. Allen's favorable economic condition, all existing debt can be refinanced at more favorable rates. What this means, as you "analyze" the transaction is that in order to question the viability of Charter post-Allen, you must question the viability of Charter pre-Allen, a proposition which is ludicrous at best and totally unsustainable on any legal or factual grounds.

With respect to the interrogatories that had been premised on faulty homework by Mr. Marticorena, she said (TX 13):

> Third, your questions suggest that you have already reached conclusion that Charter would have to accept in order to respond. We do not accept your blanket assertions, for instance, that revenues will

> increase at an annual average rate of ten percent (10%). Because we cannot accept your conclusions, we can form no meaningful response. Likewise, your inquiry into the disposition of the proceeds of closing is not relevant to your disposition of our submission.

55. In her separate letter of the same date (TX 26), Ms. Foushee explained why there was no need for a due diligence study:

> Further, that portion of your footnote which ends on Page 4 strongly suggests that the concern is with increased debt used to finance these transactions. The footnote further suggests that rate increases are needed to service the debt. It is convenient for you to dismiss, but the fact of the matter is that there is no new debt involved in this transaction.
>
> The absence of debt renders your basic premise faulty and just plain wrong. For these reasons, Charter is unwilling to fund a Study to determine that the debt levels can be sustained because there is no new debt to the franchise operating entities in this transaction.
>
> The Study, likewise, is unnecessary because the financial plan that Allen/Charter presented in the pro formas provided to you is basically the same financial plan employed prior to the acquisition. I use the term basically, because one effect of the Allen acquisition is to give Charter more favorable borrowing terms. Additionally, some preferred equity will be paid out. As stated in previous correspondence and communications, the acquisition is an assumption of current debt and an infusion of equity.
>
> When Charter has used debt to finance an acquisition in the past, you have complained that there is not enough equity. Here we have a

> transaction totally funded with equity and you make the same complaint. The two positions cannot be reconciled. I am unaware of a company being able to possess too high an equity ratio. But this is exactly what your arguments and your inquiry would suggest.

56. This was the first time that a reference was made to the projections given to Mr. Marticorena before the CCI/Allen transaction. The point made in Ms. Foushee's letters was that the company projections now being criticized were the same as the projections provided to Mr. Marticorena and found adequate before the CCI/Allen deal, *i.e.,* in the Charter/Sonic transaction. At trial, Mr. Marticorena tried to discredit Ms. Foushee on this point but wound up, in the Court's view, discrediting only himself. Mr. Marticorena testified that, after receiving the letters, he looked to see if the CCI/Allen projections were, in fact, similar to those previously submitted in the Sonic transfer a few months earlier, as suggested by Ms. Foushee's letter. He found, he said, that they were materially different. Taken at face value, this undermined Ms. Foushee. On closer questioning, however, Mr. Marticorena stated that the projections he compared were merely at the *local* Santa Cruz level rather than. at the combined *company-wide* level. Specifically, he claimed to have compared the one-page multi-year income projection for the Allen transaction (TX 56) with the one-page multi-year income projection for the Sonic projection (TX 58), *both limited to a Santa Cruz allocation only.* These do differ somewhat (but only because of the method, noted on each, used to allocate line items from the combined numbers).

57. Ms. Foushee was, however, correct after all. Mr. Marticorena himself had originally raised the projection issue *at the combined company level,* not at the local level. Specifically, Mr. Marticorena's own November 2 letter had listed "Questions Relating to Document Entitled 'Charter Communications Properties LLC Projected Income Statement' dated September 14, 1998" (TX 11). This

undisputedly had been a reference to a spreadsheet bearing that exact title and date, prepared as a combined company-wide projection (TX 57). In turn, Charter's December 1 letter (TX 26) had responded at the combined company-wide level, stating that the projections were the same as those previously provided.

58. Having now seen the spreadsheets, the Court is certain that Ms. Foushee was correct that at the *combined company-wide* level, the projections were the same, that there was no inconsistency between them, and that Mr. Marticorena had had both had [sic] sets of identical projections all along (TX 57 and TX 60). Not only was Ms. Foushee correct on this point but it is disappointing that Mr. Marticorena resorted to a phony comparison to try to evade this fact.

The Denial Resolution

59. Mr. Marticorena and Mr. Busch decided then to recommend a denial of the request for approval of change in control. On December 4, 1998, Mr. Busch personally sent a fax to Ms. Foushee in St. Louis. The fax stated that a resolution denying the change in control would come before the board of supervisors on December 8. As at least Mr. Marticorena knew, however, Ms. Foushee was on vacation in Australia. Mr. Marticorena, knew that Ms. Celeste Vossmeyer, a vice president of Charter, was supposed to be covering for Ms. Foushee. The fax, however, was not sent to Ms. Vossmeyer. It was sent to Ms. Foushee's attention. Although Mr. Busch testified that he faxed a copy of the staff report and proposed denial resolution to Ms. Foushee on December 4, 1998, the fax transmittal report indicates it was not sent to Charter until after the close of business on Friday, December 4 in St. Louis (Court Exh. 1). Mr. Busch never tried to notify anyone else at Charter.

60. On December 8, 1998, Charter's proposed transfer application came before the County board of supervisors. The board adopted a resolution denying plaintiffs' application "without prejudice." No representatives of Charter were

present at the December 8 meeting of the County's board of supervisors or had actual knowledge of the meeting. The action was part of the board of supervisors' consent calendar. The information presented to the board for its consideration was slanted heavily against Charter and Mr. Allen, neither of whom had fair and reasonable notice of the proceeding or opportunity to present their side of the issue.

61. The denial resolution based its action on the supposed fear of an excessive purchase price and the alleged failure of the applicants to cooperate in providing information (TX 15). A whereas clause recited that the "County requested certain information . . . relating to . . . the financial ability of the Buyer to generate sufficient cash flow to meet debt and obligations, satisfy capital expenditure obligations, and provide a reasonable return of and on its investment." The same recital referred to and incorporated by reference the same November 2 letter quoted above concerning the due diligence study demanding that Charter supply a due diligence study "at the sole cost and expense of the Seller and the Buyer," which letter was appended physically to the resolution. The next recital then stated that the applicants had "unreasonably delayed or refused or failed to provide a material portion of the requested additional information." Following the recitals, the action resolved specifically that the applicants had failed or refused to cooperate with "County Staff, Special Counsel and outside consultants retained by the County in undertaking the due diligence investigation of the Transfer." Presumably the "outside consultant" was Mr. Morgan. It further resolved that the applicant had failed to supply all necessary information requested by the County and had "failed to provide any independent corroboration or justification for its income projections." The resolution was permeated with references to rate of return and the financial projections.

The Clift Hotel Meeting

62. When Ms. Vossmeyer, Charter's vice president of government and community relations, learned of the County's denial, she contacted Mr. Richard Patch, an attorney in San Francisco (and trial counsel herein), to see if he could set up a meeting with the County. Mr. Patch had had a professional but adversarial relationship with the County and Mr. Marticorena going back to the 1980's, and was already engaged in a mediation with the County regarding a different dispute. Mr. Patch asked Mr. Marticorena to solicit the board of supervisors as to what would satisfy the concerns of the County regarding the CCI/Allen transfer assuming Charter would not provide any of the information requested by the County on November 2, 1998. Mr. Patch made his request so that Charter might receive the County's consent and close the transaction prior to year's end and thereby avoid any problem of the $100 million penalty. When he spoke with Mr. Marticorena, Mr. Patch indicated that (a) Charter was absolutely firm in its decision not to provide additional information or further justify the economic viability of the CCI/Allen transaction; (b) Charter would close the transaction before the end of the year; and (c) a failure of the parties to reach a mutually-acceptable resolution of the matter would result in a "big fight." Mr. Patch asked what conditions could be imposed upon the transaction to allow the County to give its consent.

63. Mr. Marticorena indicated to Mr. Patch that he had not been authorized by the board of supervisors to enter into negotiations. Approval by the board prior to year's end was unlikely, he said, given the fact that the board only met one more time, on December 15, before year's end. Mr. Patch asked Mr. Marticorena to attempt to get delegated authority from the board at its December 15 meeting, so that the parties could engage in meaningful discussions and, if mutual agreement could be obtained, County approval could be

provided prior to the closing of the transaction. Mr. Marticorena agreed to try.

64. Mr. Marticorena. then discussed the matter with the board, and on December 15, 1998, received in conjunction with the county administrative office board authorization to approve a transfer agreement subject to ratification at the first meeting of the board in January 1999 (TX 16). They were authorized by the board to negotiate an approval if Charter would agree to a further freeze and paid the County $500,000 (TX 16). The Board's authorization stated the requirements as follows:

> 1. Extend the freeze period for the rate upon completion of the rebuild to two years and improve the indexing method for rate increases.
>
> 2. Provide the County with a mitigation payment equal to approximately 5% of the difference between the per subscriber purchase price of Sonic and the sale price to Paul Allen multiplied times the number of subscribers.

65. The combatants met on December 17 at the Clift Hotel in San Francisco. Mr. Busch provided Charter with a copy of the board's conditions for approval (TX 16), and stated that the County would give its consent to the change of control prior to the close of the CCI/Allen transaction only if Charter agreed to a further rate freeze, agreed to improve the indexing method for future rate increases, and agreed to make a payment to the County of approximately $500,000. Plaintiffs were told that the County's proposal was essentially a take-it-or-leave-it proposition if they wanted consent prior to the close of the transaction. Plaintiffs refused these conditions.

66. Contrary to the County's contention, there was no verbal agreement that the discussion was "confidential" or "off the record." Mr. Marticorena had normally been expert in well documenting such agreements in the past. There was, however, no such documentation on this occasion. Nor had

Mr. Marticorena's or Mr. Busch's written submission to the board referred to any confidential or off-the-record status of the proposal (TX 16).

67. On December 23, 1998, the acquisition closed without the County's approval. Of the more than 470 local franchising authorities whose consent to the ultimate change of control that would result from the transaction was requested, only four (including the County and three other communities also represented by Mr. Marticorena) refused to give their consent by the December 23, 1998, closing date.

68. On March 9, 1999, the County issued a preliminary notice that the franchisee had violated the franchise agreement by closing without the County's consent. The notice threatened to terminate or revoke the franchise agreement and/or seek liquidated damages (TX 17). Plaintiffs then commenced this action.

ANALYSIS AND CONCLUSIONS OF LAW

The ultimate question is whether the refusal by Santa Cruz County to consent to Paul Allen's acquisition of the outstanding shares of Charter Communications, Inc. ("CCI") was reasonable and lawful. The franchise agreement incorporated the terms of the local cable ordinance under which the County's consent was required for the transfer but could not be "unreasonably withheld."[2] The denial was based

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[2] Section 3(C)(1) of the franchise agreement provides:

> The provisions of the Ordinance are incorporated herein by reference as if set out in full, and form part of the terms and conditions of this Agreement. In the event of any conflict or inconsistency between the terms and conditions of this Agreement and the provisions of the Ordinance, this Agreement shall prevail.

(TX 3 at 1797).

The cable ordinance provides, in relevant part (TX 2 at 900):

upon plaintiffs' refusal to comply with the County's information requests, its demand for an independent financial study to be financed by Charter, its demand for cash payment of $500,000 and its demand for a further rate freeze. Whether consent was "unreasonably withheld" turns upon whether those demands were reasonable. Information requests that exceeded the County's authority to request information under Section 617 of the Cable Act and the FCC regulations promulgated thereunder would not have been reasonable. The same is true of information requests that violated plainfiffs' First Amendment rights. To deny consent based on plaintiffs' failure to provide any such information would, in turn, be

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> M. Nontransferable. The franchise shall not be sublet or assigned, nor shall any of the rights or privileges therein granted or authorized be leased, assigned, sold or transferred, either in whole or in part, nor shall title thereto, either legal or equitable, or any right, interest or property therein, pass to or vest in any person, except the grantee, either by act of the grantee or by operation of law, without the prior written consent of the grantor, *which consent shall not be unreasonably withheld.* The granting of consent shall not render unnecessary any subsequent consent. *The grantor shall promptly request and the grantee shall furnish such information as the grantor reasonably requests in connection with such transfer.* Failure of the grantor to act within sixty days of receipt of such requested information shall be deemed the consent of the grantor thereto.
>
> N. Change in Control.
>
> 1. The grantee shall promptly notify the grantor of any proposed change in control of the grantee. Such change in control shall make the franchise null and void unless and until the grantor shall have consented thereto subject to the provisions of paragraphs 2 and 3 of this subsection, which consent shall not be unreasonably withheld. The grantor shall promptly request and the grantee shall furnish such information as the grantor reasonably requests in connection with such change of control. Failure of the grantor to act within sixty days of receipt of such information shall be deemed the consent of the grantor thereto.

Code of the County of Santa Cruz 5.24.030(M)-(N)(1) (emphasis added).

unreasonable. And, to deny consent merely for refusing to pay unlawful fees or for refusing to acquiesce in an unlawful rate freeze would be unreasonable. The parties sharply disagree on the law governing each of these considerations.

The FCC 120-Day Rule

With respect to the FCC's 120-day regulation, the Court concludes, for the reasons set out at length hereinafter, that the FCC's 120-day rule is purely procedural. All substantive limits on the power of local franchising authorities to regulate cable transfers must flow from the First Amendment, other federal law, or local law or agreement. As to the procedural aspects, however, the rule must be construed to impose certain outer limits on LFAs' power to request information over and above that required by Form 394 implementing the rule. Because this is an issue of first impression, this order will set forth the reasons in detail.

Section 617 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. 537, established a 120-day timeline for local franchising authorities to act on requests for approval of "transfers" of cable franchises:

> A franchising authority shall, if the franchise requires franchising authority approval of a sale or transfer, have 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority. If the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time.

Pursuant to this rulemaking authority, the FCC held rulemaking proceedings and promulgated the following rule

in 1993, a rule whose interpretation is one of the core issues in this case:

> (a) A franchise authority shall have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information. required by the terms of the franchise agreement or applicable state or local law to act upon an application to sell, assign, or otherwise transfer controlling ownership of a cable system.
>
> (b) A franchise authority that questions the accuracy of the information provided under paragraph (a) must notify the cable operator within 30 days of the filing of such information, or such information shall be deemed accepted, unless the cable operator has failed to provide any additional information reasonably requested by the franchise authority within 10 days of such request.
>
> (c) If the franchise authority fails to act upon such transfer request within 120 days, such request shall be deemed granted unless the franchise authority and the requesting party otherwise agree to an extension of time.

58 Fed. Reg. 42019 (Aug. 6, 1993); 58 Fed. Reg. 45064 (Aug. 26, 1993). The rule remains codified at 47 C.F.R. 76.502 (1999).

When the FCC issued the rule, it also issued a preamble explaining it. The preamble set forth the competing arguments of the industry versus the local franchising authorities concerning the desire of LFAs to seek information before giving approvals:

> 82. *Comments.* Most cable commenters request that the Commission establish uniform rules regarding the information required to commence the 120-day review period, and clarify that the 120-day period is not tolled by additional information

requests, not otherwise required by Commission rules, the franchise, or applicable local law. Cable commenters argue that such a limitation is necessary to ensure the efficacy of the 120-day statutory limitation. Cable commenters argue that such information requirements should be limited to information necessary to establish the legal, technical and financial qualifications of the proposed transferee. Cable commenters also suggest that the Commission limit the ability of franchise authorities to request additional information, beyond the information required by Commission rules, the terms of the franchise, or applicable local law.

83. In contrast, franchise authorities argue that the FCC should confirm that local franchise authorities have broad authority to request all information necessary to determine whether a transfer is in the public interest. According to local authorities, the Commission's statutory mandate is to develop regulations to ensure that the franchise authority receives all information necessary to "*begin*" an evaluation of a transfer request. As a consequence, franchise authorities insist that they should not be limited in the types of information they can request. Finally, franchise authorities argue that the 120-day period should begin to run only after the franchise authority notifies the cable operator that it has received all information necessary to evaluate the proposed transfer.

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992, FCC Report & Order at ¶¶ 82-83, FCC 93-332, MM Docket No. 92-264 (1993).[3]

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[3] A synopsis of this document may be found at 60 Fed. Reg. 37830 (July 24, 1995).

The FCC balanced these competing concerns in light of congressional intent. The FCC held that the 120 days should begin as soon as the *required* information is submitted. The FCC rejected the argument that the 120-day period should commence only after all *supplemental* information is submitted:

> 85. The informational requirements we adopt in response to this provision are limited to the information necessary to establish the legal, technical and financial qualifications of the proposed transferee and any information required by the franchise or applicable local law. In developing these informational requirements, we looked to the information required by the Commission in connection with transfer requests for broadcast licenses and CARS authorization [footnote omitted]. In this regard, the Commission has developed a standardized form to be used in connection with transfer requests . . . A copy of the FCC cable transfer form is attached as Appendix B to this *Report and Order/Further Notice*.
>
> 86. In addition to the information specifically solicited by the FCC Form, franchise authorities are permitted to request such additional information as is reasonably necessary to determine the qualifications of the proposed transferee. However, such requests for additional information beyond the requirements of the franchise agreement or local law, will not toll or extend the 120-day period unless the cable operator and franchise authority otherwise agree to an extension of time as provided under the statute. Cable operators are required, however, to promptly respond to such requests by completely and accurately submitting all information reasonably requested by the franchise authority. We conclude that use of the Commission's standardized form in connection with

> the 120-day limitation will ensure that franchise authorities are provided with sufficient information to evaluate and render prompt decisions with respect to such transfer requests.

Id. at ¶¶ 85-86.

Footnote 38 of the FCC preamble warned LFAs against trying to delay a transfer or to impose conditions that would impinge on the FCC's statutory authority over rate regulation:

> Section 617 does not require the Commission to adopt substantive standards governing the approval of transfers. It should be emphasized, however, that in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters. For example, a franchising authority may not delay a transfer or impose conditions on a transfer authorization that would impinge upon the Commission's statutory authority.

Id. at ¶ 39 n.38.

FCC Form 394 was appended to and promulgated with the new rules. Form 394 was prescribed for obtaining LFA approval for a transfer of a franchise. The instructions thereon stated in part:

> As required by Section 617(e) of the 1992 Cable Act, the franchise authority shall have 120 days from the date of filing of this form, complete with all exhibits and any information required by the franchise agreement or applicable state or local law, to act upon such request. If the franchise authority fails to render a final decision on such request within 120 days, such request shall be deemed granted unless the requesting party and the franchise authority agree to an extension of time.

* * *

> In addition to the information requested on this form, cable operators are required to submit all information required by the cable franchise agreement or applicable local law or that the franchising authority deems necessary or appropriate in connection with the transfer determination. Requests for such additional information by the franchise authority shall not toll the 120-day limit on franchise authority consideration of transfer requests.

Part I of the form required a copy of the transfer agreement but stated that "Confidential . . . pricing or marketing information . . . may be redacted." Part II concerned the Transferee/Assignee. Section II thereof set forth questions concerning "legal" qualification. Section III set forth two questions concerning "Financial Qualifications," quoted exactly as follows:

> (a) The transferee/assignee certifies that it has sufficient net liquid assets on hand or available from committed resources to consummate the transaction and operate the facilities for three months.
>
> Yes____ No____
>
> (b) Attach as an exhibit the most recent financial statements, prepared in accordance with generally accepted accounting principles, including a balance sheet and income statement for at least one full year, for the transferee/assignee or parent entity that has been prepared in the ordinary course of business, if any such financial statements are routinely prepared. Such statements, if not otherwise publicly available, may be marked CONFIDENTIAL and will be maintained as confidential by the franchise authority and its agents.

Note well that the form required information about projected financial strength only as far out as one year and, as to liquid

assets, only three months out. Section IV had a single question concerning "Technical Qualifications":

> Set forth on an Exhibit a narrative account of the transferee's/assignee's technical qualifications, experience and expertise regarding cable television systems, including, but not limited to, summary information about appropriate management personnel that will be involved in the System's management and operations. The transferee/assignee may, but need not, list a representative sample of cable systems currently or formerly owned or operated.

In response to the 1992 rule, various LFAs promptly petitioned for reconsideration, eventually leading to a 1995 FCC order reaffirming the 1992 order. On reconsideration, the LFAs argued that:

> Section 617 of the Communications Act contains no limit on the information a franchising authority may require a cable operator to submit in connection with a request for approval of a sale or transfer, and challenges the propriety of the Commission's implementation of rules that limit the amount and type of information the local franchise authority may obtain from the cable operator to information specifically required by FCC Form 394, the terms of the franchise agreement or applicable state or local law [footnote omitted].

In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992, FCC Memorandum Opinion & Order on Reconsideration of the First Report & Order at ¶ 47, FCC 95-21, MM Docket 92-264 (1995).

The LFAs further argued (¶ 48):

> [T]he 120-day period should not begin to run until all information requested by the local franchise

> authority has been submitted and the local franchise authority so notifies the cable operator. The current rule . . . inappropriately limits the duration of local franchising authorities' power to disapprove cable system transfers [footnote omitted].

In this connection, the LFAs relied on the House Report leading up to the 1992 Act. This report is central to defendant's arguments herein and the relevant paragraphs deserve full quotation (with key passages in italics):

> Subsection (e) limits the duration of time a franchising authority has to disapprove a transfer. After the initial 36-month period following the sale or transfer of ownership of a cable system, if the franchise requires franchising authority approval of a sale or transfer, a franchising authority has 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations. If the franchising authority fails to render a final decision on the request within 120 days, the request shall be deemed granted, unless the requesting party and the franchising authority agree to an extension of time.
>
> The Committee intends that the 120-day limitation on franchise approval of a sale or transfer required under subsection (e) shall not commence until the cable operator has provided the franchising authority all information required under the Commission's regulations. The time limit may be extended by mutual agreement of the franchising authority and any party requesting approval of the sale or transfer.
>
> The Committee intends that the FCC regulations will be designed to ensure that every franchising authority receives the information required to begin an evaluation of a request for approval of a sale or

> transfer. *Such information may include detailed financial information showing the effect of the transfer or sale on rates and services; the contracts and agreements underlying the sale or transfer; information concerning the legal, financial and technical qualifications of the transferee; and information concerning the transferee's plans for expanding (or eliminating) services to subscribers. The amendment is not intended to limit, or give the FCC authority to limit, local authority to require in franchises that cable operators provide additional information or guarantees with respect to a cable sale or transfer. The subsection also is not intended to limit, or give the FCC authority to limit, a franchising authority's right to grant or deny a request for approval of a sale or transfer, in its discretion, consistent with the franchise and applicable law.*

House Rep. No. 102-628, 102d Cong., 2d Sess., 120-21 (1992) (emphasis added).

Plaintiffs dismiss the House Report as having been superseded and rendered inoperative by a conference report. This argument is without merit. Section 617 derived from the House. The Senate bill had no analogue to the final enactment. The final version of Section 617 was virtually identical to the House bill described in the House Report. Plaintiffs' repeated contention that the House Report is somehow not proper legislative history is mystifying. Indeed, the FCC itself twice cited the House Report.[4] It is a separate question, however, whether the House Report can carry the weight assigned by the County, as will be shown.

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[4] The FCC footnoted the House Report twice (at its notes 108 and 109). At no time did the FCC order indicate that the House Report had been rendered inoperative by a subsequent conference report.

In its order on reconsideration, the FCC acknowledged that Congress intended LFAs to be able to seek additional information but declined to change the rule. Significantly, the FCC did not address any *substantive* ground that LFAs might invoke to deny requests; nor did it address the phrase (in the House Report) concerning solicitation of information on "the effect of the transfer or sale on rates and services." The main issue addressed by the FCC concerned the 120-day procedural limit (the NATOA referenced below was a trade association of LFAs):

> 50. *Discussion.* * * * Our implementing rules provide for commencement of the 120-day period when the cable operator has submitted a completed FCC Form 394 and any additional information required by the terms of the franchise agreement or applicable state or local law [footnote omitted]. We concluded in the *First Report & Order* that local franchise authorities are permitted to request additional information they deem reasonably necessary to determine the qualifications of the proposed assignee or transferee, but that requests for information not explicitly required by the franchise agreement or local law will not toll the statutory 120-day limitation unless the franchise authority and the cable operator agree to an extension of time [footnote omitted]. The rationale underlying this rule is to provide cable operators some degree of assurance and certainty that local franchise authorities will act promptly and not unduly delay consummation of proposed transactions. We affirm the rule we adopted in the *First Report & Order* and, accordingly, deny NATOA's request that the 120-day period not commence until the cable operator is affirmatively advised that the franchise authority has received all information it seeks.

The FCC rejected the LFAs' contention that they had unlimited scope of inquiry on transfers:

> 51. Section 617(e) provides that when a local franchise agreement grants the local franchise authority the right to review sales or transfers of cable systems held for three or more years, the franchise authority shall have 120 days to act upon any such request that contains the information required by Commission regulation or by the franchise authority [footnote omitted]. We have interpreted this language as a limitation on the information a cable operator must provide to trigger the 120-day time period. While this language arguably could be interpreted to allow unlimited requests for information by the franchise authority, we do not believe that such an interpretation comports with the intent of Congress.

The FCC then reaffirmed two fixed but competing principles — the finality of the 120-day deadline and the duty of applicants to answer LFA information requests over and above the Form 394 data:

> 52. In enacting Section 617(e), Congress imposed a 120-day approval period on the sale or transfer of cable systems held for three or more years because Congress wanted to ensure that the local franchise approval process not unduly delay the consummation of transactions that do not implicate the concerns underlying the anti-trafficking provision. The language of the statute and the legislative history reflect Congress' expectation that the Commission establish regulations designed to ensure that franchising authorities that possess the right to review transfer requests receive the information required to begin an evaluation of a request for approval of a sale or transfer of such a cable system [footnote omitted]. Accordingly, we created FCC Form 394 with the expectation that the

> information required by the form would establish the legal, technical, and financial qualifications of the proposed transferee or assignee. The legislative history also clearly establishes that Congress intended to allow local franchise authorities to request information that is required by the franchise agreement, in addition to that required by Commission regulation [footnote omitted]. Consequently, we adopted rules requiring a cable operator seeking local franchise authority approval of a proposed transfer to submit any additional information provided by the terms of the franchise agreement. The rules we adopted provide that the franchise authority shall have 120 days from the submission of a completed FCC Form 394 and any additional information required by the terms of the franchise agreement or applicable state or local law, to act upon the waiver request [footnote omitted]. Thus, the cable operator is on notice that information requirements may exist in three locations and that the submission of all such information is necessary for the franchise authority to be bound by the 120-day time period. To the extent the local franchise authority seeks additional information, as we stated in the *First Report & Order,* cable operators are required to respond promptly by completely and accurately submitting all information reasonably requested by the franchise authority [footnote omitted].

In the end, the FCC stood by its prior order and re-affirmed the 120-day regulation without change. It is worth stating the obvious — Section 617 and the 120-day rule were intended to require LFAs to act on the merits of applications by the 120-day deadline or else the application would be deemed granted. The 120-day clock was meant to start as soon as a "complete" Form 394 is submitted to the LFA. The information-gathering process was designed to permit a reasonably-informed but not necessarily a perfectly-informed judgment

on the merits. With these guiding objectives in mind, this order turns to the specific questions of interpretation of the rule.

* * *

First, although Section 76.502(b) of the regulation is not clearly worded, the Court interprets it to mean that any LFA objection concerning the "accuracy" of any Form 394 information (or information required by the franchise agreement or by state or local law) must be affirmatively asserted within thirty days of the filing of the Form 394. If the cable operator then fails, as to the timely objections, to provide any information reasonably requested within ten days of any such request, then all asserted objections to the "accuracy" of the specifically-questioned information survive the thirty-day deadline. Specific factual information whose accuracy is not questioned in this manner within the first thirty days, however, is deemed accepted as accurate even if other points are timely questioned. Once a discrete issue becomes closed in this fashion, it must be deemed unreasonable for an LFA to attempt to resurrect it later on through supplemental information requests. Accepted as accurate does not mean approved on the merits. Negative (but accurate) information in an application, for example, may ultimately warrant rejection.

Second, subsection (b) addresses "accuracy." Does it also comprehend "completeness," *i.e.*, must LFAs also object to the completeness of a Form 394 submission within thirty days? Although the language could be clearer, this order concludes that "accuracy" includes "completeness" for purposes of the rule. A major point of the "deemed accepted" mechanism of the rule was to start the 120-day clock upon "completeness" (see subsection (a)). To eliminate doubt as to when the clock begins, the rule ought to be construed to require LFAs to object within thirty days to the *completeness* or *accuracy* of the original submission. If an LFA does not do so as to any given item, such as, for example, the applicant's legal qualification to operate a cable system, then

the LFA may not re-open that subject with supplemental questions later on. A failure to timely object to completeness means that all parties are on notice that the 120-day clock is ticking.

Third, when an objection is timely made and the operator supplies *supplemental* data, is there a deadline for the LFA to object to its accuracy or completeness of the *supplement* and, apart from objections, is there a deadline for making a request for more information? The rule does not expressly cover these practical questions. Subsection (b) addresses only questions directed to the initial submission *(i.e.,* "the information provided under paragraph (a)"). If an objection is timely made to the completeness or accuracy of part of the original submission, then it logically follows that, as to that point of inquiry, the LFA may continue to press, even after a supplemental response, for a complete and accurate answer. Similarly, there is no prescribed deadline for making supplemental information requests. Although the rule sets no limit or deadline, however, a rule of reason can and should be inferred from the FCC's 1995 order that "cable operators are required to respond promptly by completely and accurately submitting all information reasonably requested by the franchise authority" (¶ 52). The whole point of the statute and the rule is to expedite approvals (or denials) and to do so within 120 days. Interrogation that would interfere with the timely accomplishment of that goal should be viewed with suspicion. It would be unreasonable, for example, for an LFA to wait until the 119th day to request voluminous follow-up on a supplement provided, say, on the 45th day. In paragraph 51 of the 1995 order (quoted above), the FCC rejected the notion that Section 617(e) authorized "unlimited requests for information." Therefore, although the rule does not address this point explicitly, the Court concludes that the "reasonably requested" concept implies a rule of reason for supplemental information requests, both as to timing and scope.

Fourth, if an LFA makes certain information requests that are reasonable and others that are unreasonable in the

circumstances, what should be the effect? The rule addresses this point only indirectly — in order to receive the benefit of the "deemed accepted" provision of subsection (b), the operator must supply "any additional information requests reasonably requested by the franchise authority." The Court understands this to mean that an operator may spurn an unreasonable request and still receive the benefit of the 120-day limit. Otherwise, however, the operator must adequately respond. But if an LFA buries its otherwise reasonable requests among a plethora of unreasonable requests, such that it is too burdensome to sort the good from the bad, the LFA offends the rule of reason. In that case, all of the commingled requests should be deemed inoperable, the LFA having engaged in a procedure for soliciting information that is unreasonable.

Fifth, does the 120-day provision impose any *substantive* limits on potential denials of transfer by LFAs? Plaintiffs urge that the FCC 120-day regulation confines all LFAs' inquiries to the three issues of legal, technical and financial qualification, and/or to information required by local law or agreement. This argument lacks merit. The regulation does not so state and paragraph 52 of the FCC 1995 order (last sentence) rejected any such limitation. And, the FCC recognized in Footnote 37 of its 1993 order that Section 617 does not involve "substantive standards governing the approval of transfers" in contrast to other statutory provisions that did grant FCC substantive authority, such as over rate regulation (as of 1993). Moreover, Section 617 itself makes no mention of substantive criteria; it speaks only in terms of a 120-day clock. In this regard, the House Report is plain spoken: Section 617 "is not intended to limit, or give the FCC authority to limit, a franchising authority's right to grant or deny a request for approval of a sale or transfer, in its discretion, consistent with the franchise and applicable law." House Rep. No. 102-628 at 120-21 (1992). The report further states that the LFA may request "detailed financial information showing the effect of the transfer or sale on rates and services . . ." (*ibid.*). Although this power to request

information must be subject to the rule of reason, it presupposes that, in appropriate cases, an LFA might lawfully deny a transfer because of an adverse impact on rates and/or services. As a result, this order concludes Section 617 and the 120-day regulations issued thereunder are purely procedural. Any substantive limits on LFAs' power to regulate transfers must come from other sources, namely the First Amendment, other federal statute or local law or agreement.

Finally, if an LFA imposes unreasonable information demands, it may not then deny the application on the ground that the applicant refuses to answer them. The rule is clear (in subsection (c)) that no extension of the 120 days is allowed without the mutual consent of both sides. The rule requires a decision *on the merits* by the LFA before the 120-day clock expires. An LFA may deny an application on the merits on any lawful ground but to deny an application on the procedural ground of spurning an unreasonable information demand would eviscerate the rule and Section 617. In such circumstances, an application must be "deemed granted" under Section 617 and the rule.

The Procedural Force of the 120-Day Rule and Its Application Herein

This order now turns to the impact of the 120-day rule herein. A preliminary point, however, must be made. Charter has vigorously argued that the County already had in its possession all of the submissions for the previous Sonic transaction and that many of the information requests for the Allen transaction had already been answered in the Sonic materials. This was true in at least some instances. But the argument lacks any serious force and the Court rejects it. As to the Allen transaction, the information requests and the responses thereto proceeded on "a group basis." Mr. Marticorena made the requests on behalf of six LFAs. With the exception of Santa Cruz County, none of the LFAs had the Sonic information. Ms. Foushee responded in kind, *i.e.*, on a "group basis." Charter did not point out that the information

requested was already contained in the Sonic materials provided to one of the LFAs before. Nor did it ask to carve Santa Cruz out of the pack and treat it individually. The County could not reasonably have been expected to rummage through its prior Sonic files to find any pages corresponding to its points of inquiry. Plaintiffs' "already had the information" argument must be rejected. For different reasons, however, this order sustains plaintiffs' procedural arguments under the 120-day regulation.

* * *

The Form 394 was filed on August 18, 1998. The September 1 information request (TX 8) was made within thirty days and was therefore timely. No objection, however, as to "completeness" or "accuracy" was made, so the 120-day clock started on August 18. It expired on December 16. The September 1 information request — the only one within the thirty-day window — dealt with future impact on rates and details of the economics of the deal. No issue was raised regarding the legal or technical qualifications of Charter or Mr. Allen. While a question was raised concerning what role Mr. Allen would have in the ongoing operation of Charter, that could not fairly be said to implicate Charter's technical qualification to operate a cable system or whether top or mid-level management would remain. Accordingly, issues concerning the technical and legal qualifications of the applicants, after change of control, were foreclosed to subsequent inquiry by the failure to flag the issues within the thirty-day window. The application might have been denied, of course, on substantive grounds revealed in the application but not on the ground that follow-up information was not provided on those subjects. This is a significant conclusion because, after it was too late, Mr. Marticorena did try to resurrect one such issue, as shall be shown.

With respect to financial qualifications, the September 1 information request did not object to the completeness or accuracy of the data provided. Although it did pose numerous questions concerning potential future rate increases and the

economic wisdom of the acquisition, those questions did not involve financial qualification. In fact, it seems clear that Charter and Mr. Allen were financially qualified and that no one has ever doubted it. The County's issue has, rather, been whether, rich though Charter and Mr. Allen may have been and remain, the economics of the deal posed risks of financial pressure eventually to increase rates or to decrease service. As such, the September 1 letter was not an "objection" to the original submission but as the parties have jointly stipulated, a supplemental "information request" (Stipulated Fact No. 28).

The first issue under the 120-day rule, then, is whether the September 1 additional information request was reasonable such that a failure to answer it would have supported a disapproval. In determining reasonableness, the test should not be whether the trier of fact would have asked the questions. Rather, the issue is whether any LFA in the circumstances could reasonably have propounded them.

Granting wide berth to the County, this order nonetheless finds that the set of seventy questions was unreasonable. The letter was mostly boiler-plate questions having little or nothing to do with the actual transaction. Mr. Marticorena simply lifted them from his standardized word-processing exemplars and sent them on. Similarly, a large number of other questions related to the "loan" being used to finance the deal. There was, however, no loan. Mr. Marticorena knew that Mr. Allen was paying cash. Mr. Allen had already represented that he was not going to finance the acquisition through debt. In fact, he was immediately going to pay down Charter's existing debt. The balance of the inquiry was further massive and sweeping. It was unfocused on any specific issue and was directed indiscriminately at everything. One question, to take only one example, literally asked the parties to produce for inspection "[a]ny and all . . . documents . . . in the hands of Charter, Paul Allen, or any related entity . . . regarding the System or Transfer" (TX 8 at 6). This called for the entire universe of every scrap of paper on the deal. In short, the September 1 information request was so

unreasonable in scope that it should have been deemed ineffective under the FCC rule to require a response. To its credit, however, Charter selectively responded to the letter with a thick submission on September 17 (TX 10).

* * *

This order now assumes, in the alternative, that the September 1 letter was reasonable. On that assumption, it is necessary to assess whether Mr. Marticorena's twin follow-up requests on November 2, 1998, were reasonable. As related above, the parties jointly have referred to one such letter as the second additional "information request" (TX 11). The other November 2 letter laid out a demand for a due diligence study to be paid for by Charter (TX 12).

Turning to the "information request" (TX 11), Mr. Marticorena's letter was 7-1/2-pages long, single-spaced, with 31 items of inquiry (counting subparts). *First*, it included a set of follow-up questions based on a materially faulty set of conclusions erroneously drawn by Mr. Marticorena from Charter's financial projections submitted on September 17. Those seven questions were all grounded in Mr. Marticorena's mistake. In essence, he accused Charter of projecting results that it had never projected. No excuse for his errors was offered at trial. *Second,* many of the questions would have required Charter to go out and locate third-party sources of information and then to vet its internal projections against such external data. While some smaller number of such cosmic questions might conceivably have been reasonable in more limited circumstances, the large number actually propounded and the bone-crushing work the answers would have entailed rendered them unreasonable in scope. The foregoing are merely illustrative of the problem. It is worth noting that no contention was made that the earlier answers were not complete or accurate. In the entire letter, only nine questions were reasonable in the Court's view. They were follow-up questions, tucked away at page 7, asking for clarification of certain discrete aspects of the September

17 submission. They were buried among the debris of improper questions.

The letter tried, moreover, to resurrect the issue of Charter's technical qualification by asking for production as far out as a decade, among other things, of employment contracts for top management (TX 11 at 6-7). This issue had already been procedurally foreclosed by the failure of Mr. Marticorena to raise an objection to technical qualification within the thirty-day period. Further as to timing, the request came on Day 76 in the 120-day timeline and 46 days after the September 17 submission. To have waited until November 2 to propound such a massive assignment violated the rule of reason. In short, the second information request was unreasonable both as to scope and as to timing.

Turning to the separate due diligence demand also dated November 2, this order does not rely on the issue of its timing because Ms. Foushee's ambiguous responses might well have led Mr. Marticorena reasonably to believe that a study would be considered, at least for part of the period up to November 2. Independently of timing, however, the issue remains under the 120-day rule whether the *scope* of the proposed study was reasonable. This order holds that the proposed scope was unreasonable.[5]

In a transaction where the threshold issues of financial, legal and technical qualifications were established, it was unreasonable to launch a sweeping inquisition into the equity economics of a nationwide cash purchase of cable companies, into whether the buyer paid "too much," and into estimating future rates of return on investment as far out as ten years,

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[5] Ms. Foushee's ambivalence over the due diligence study was not a reasonable excuse for Mr. Marticorena delaying his second information request. The letter was separate and apart from the due diligence study. Mr. Marticorena should have propounded the information request much sooner, given the 120-day window, and the need to receive any information soon enough to be read and understood by Mr. Marticorena and the County staff.

among other financial questions, in order to divine whether the new owner might, in future years, seek to raise rates or to cut service. Due diligence studies are extremely rare in Form 394 proceedings. Mr. Marticorena seems to be the only one to have required one before. The normal fear is that the cash flow would not cover the debt service and then a bank would have to take over. That fear was absent here. Here, there was no new debt. There was, in fact, going to be less debt. Rate increases and service cuts, moreover, are not the only way to improve one's rate of return. Improving service and increasing subscribers are just as plausible. Every company tries to maximize profits regardless of how much equity is originally invested. Each investor has different expectations of a fair return. Tax considerations, strategic positioning, and private beliefs about where the economy may be headed, inform investment decisions. Granting that an LFA has the right to make reasonably detailed inquiries into the extent to which a change of control would impact rates and/or service, the connection between Mr. Allen's future return on investment over ten years and any future impact on rates and service was simply too remote and tenuous to qualify as reasonable additional information in an expedited process limited to 120 days — all the more so to the extent the demand was not for information but for submission to a third-party process and investigation. Accordingly, Charter was not required to honor the November 2 requests and the 120-day clock was not tolled as a result of Charter's failure to do so. The County's resolution denying the change of control on this ground was unreasonable and unlawful.[6]

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[6] The local Santa Cruz ordinance, incorporated by reference in the agreement, contemplated an even shorter fuse — sixty days. Viewed in light of the shorter time line contemplated by the local ordinance, the information request and due diligence study demands were all the more unreasonable in scope. Since the ordinance is the source of the requirement not to unreasonably withhold consent, the sixty-day window set by the same ordinance (indeed, same paragraph therein) lends meaning to the scope of information contemplated.

The Federal Statutory Cap on Franchise Fees

As a substantive matter, the demand for Charter to pay the cost for a due diligence study violated the Cable Act. Section 622 of the Cable Act imposes a five-percent cap on cable franchise fees collected by LFAs, stating in relevant part:

> For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services.

47 U.S.C. 542(b).[7]

The courts have generally held that requirements that operators reimburse consultant and legal fees are deemed to be franchise payments. Accordingly, when a local government's franchise already requires the maximum franchise fee, imposing payment for consultant fees violates the cap. In *Time Warner Entertainment Co. v. Briggs,* Civ. A. No. 92-40117-GN, 1993 WL 23710 (D. Mass. Jan. 14, 1993), the court found the following provision of the local cable-licensing law unenforceable and preempted by the Cable Act:

> All charges and fees incidental to awarding, renewing, extending and/or enforcing the License, including, but not limited to, . . . reimbursement to the Town for legal advertising, attorney's fees, consultant's fees . . . shall be paid by the Licensee.

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[7] Section 542(g)(1) of the Cable Act defines "franchise fee" broadly:

> [T]he term "franchise fee" includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such.

Id. at *5. The court found that the consultant and legal fees provision was preempted by the Cable Act and granted summary judgment for Time Warner on that issue:

> Apparently, there is no dispute among the parties that, under the Licenses, Warner Cable will be required to pay five percent (5%) of its gross revenues to the Towns in franchise fees . . . Any additional franchise fee imposed by the Towns will exceed the maximum allowable fee. By requiring Warner Cable to reimburse them for attorney's and consultant's fees, the Towns impose a "franchise fee" on Warner Cable, as that term is defined in 47 U.S.C. § 542. Consequently, inclusion of the words "attorney's fees, consultant's fees" in Section 6 of the Bylaws contravenes federal law, and, therefore, those words are preempted and declared unenforceable.

Id. at *6.

Similarly, *Robin Cable Systems, L.P., v. City* of *Sierra Vista,* 842 F. Supp. 380 (D. Ariz. 1993), held that the city's demand for up to $30,000 for franchise "processing costs," coupled with the city's five-percent fee, required summary judgment for the cable operator:

> Section 2.2 of the Agreement [the franchise fee] is a permissible fee to be charged under 47 U.S.C. § 542(b). Section 2.3 of the Agreement, however, appears to violate the Cable Act. The term "franchise fee" is defined broadly to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other government entity on a cable officer or cable subscriber . . ." 47 U.S.C. § 542(g)(1). The exceptions listed under 47 U.S.C. § 542(g)(2) are narrowly tailored. Section 542(g)(2)(D) allows a municipality to make charges "incidental to the awarding . . . of the franchise . . ." 47 U.S.C. § 542(g)(2)(D). A fee of up to $30,000 is

> more than incidental. Any substantial fee charged on top of the annual license fee is inconsistent with the Cable Act.

842 F. Supp. at 381. *See also Birmingham Cable Communications, Inc., v. City* of *Birmingham,* Civ. A. No. CV 87-L-0755-51989 WL 253850 (N.D. Ala. 1989) (granting cable operator summary judgment, where city attempted to require cable operator to pay for the city's consultant costs).[8] These cases dealt with renewal fees, not transfer fees, but there is no logical basis for treating them differently.

Here, the County demanded that Charter provide and pay for a study by an independent financial consultant. The November 2 letter from Mr. Marticorena, for example, requested an outside financial consultant report prepared at "the sole cost and expense of" the plaintiffs (TX 33, TX 12). The estimated fee of the report was $39,000. The franchise agreement already imposed upon Charter the maximum annual five-percent franchise fee (TX 3 at 1798). Thus, the County's requirement that Charter pay for the fee of an independent financial consultant violated the statutory cap.

The County argues that a funding requirement is lawful. The Act defines the term "franchise fee" to include ". . . any tax, fee, or assessment of any kind imposed by a franchising authority . . . on a cable operator . . . solely because of [its] status as such." 47 U.S.C. 542(g)(1). The Act exempts from the limitation any "requirements or charges incidental to the

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[8] *Birmingham Cable* ordered the city to comply with 47 U.S.C. 542(b):

> Plaintiff is entitled to apply for and may obtain renewal of its cable television franchise in Birmingham, Alabama, without having to pay or to agree to pay, above and beyond the Cable Act five percent franchise fee, the city's franchising expenses, consultant costs, or any other regulatory costs or fees.

1989 WL 253850 (N.D. Ala. 1989) (emphasis added).

awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages." The specific examples in the 1984 Act of such requirements or charges are illustrative and not exhaustive.

Nonetheless, a fee for outside consultants to prepare analyses that would ordinarily be done by county or municipal staff is not like the illustrative examples given. The record shows that due diligence studies are virtually unknown in the transfer of franchises. Usually, the LFAs themselves are able to understand and analyze the submissions. That would be the normal expectation and the backdrop against which the statute was passed. The record shows nothing so unusual about the instant acquisition as to indicate an ordinary LFA could not understand it. It was illegal for the County to impose the requirement to pay the consultant fee (regardless of how the consultant was picked).

The County argues that, on the facts, it dropped the demand for paying for a due diligence study. Until November 2, however, there is no doubt that Mr. Marticorena was demanding a pre-fund fee for his own consultant candidate, Mr. Morgan. One of his two November 2 letters (TX 12), however, altered course slightly. Instead of funding Mr. Morgan, Mr. Marticorena insisted on funding an "independent financial consultant." In substance, however, there was no difference between the old and new approaches. In both cases, the fee would come out of Charter's pocket for an outside independent expert. Either version constituted a proscribed fee.

Contrary to the County's argument, it is simply not true that the board's denial resolution was not based on the refusal to pay for a due diligence study. When one reads the actual resolution, it becomes apparent how wrong the County's contention is. A whereas clause recited that the "County requested certain information . . . relating to . . . the financial ability of the Buyer to generate sufficient cash flow to meet debt and obligations, satisfy capital expenditure obligations,

and provide a reasonable return of and on its investment." Moreover, the same recital referred to and incorporated by reference the same November 2 letter quoted above in the due diligence study wherein Charter was to supply a due diligence study "at the sole cost and expense of the Seller and the Buyer," which letter was appended physically to the resolution. The next recital then stated that the applicants had "unreasonably delayed or refused or failed to provide a material portion of the requested additional information." Following the recitals, the action resolved specifically that the applicants had failed or refused to cooperate with "County Staff, Special Counsel, and outside consultants retained by the County in undertaking the due diligence investigation of the Transfer." If the "outside consultant" was not Mr. Morgan, then who was it? It further resolved that the applicant had failed to supply all necessary information requested by the County and had "failed to provide any independent corroboration or justification for its income projections." Plainly, this was a reference to the independent study. The resolution is further permeated with references to rate of return and the financial projections. To say that the failure to pay for a due diligence study was not a basis for the denial resolution is palpably wrong.

Lastly, the County argues that the due diligence study already done at Mr. Allen's request by NationsBanc-Montgomery Securities would have filled the bill at no extra expense and was wrongly withheld. Perhaps it was called for by the massive document requests. So was everything else. It was understandable that Ms. Foushee finally threw up her hands and stopped trying to satisfy Mr. Marticorena's ever-mounting, never-ending stream of all-embracing information requests. Charter did not act unreasonably in failing to discover that Mr. Allen had had the document all along. Most significantly, the Court is clear that the NMS report fell far short of the independence dictates of Mr. Marticorena's November 2 letter and that it did not cover all the required substantive elements stated by him (TX 12). Even had it been

provided, therefore, Mr. Marticorena, could have pointed to his own November 2 letter to justify the NMS shortcomings.

In short the denial resolution and the County's entire course of conduct were based in part on an illegal consideration, the demand that Charter pay for an independent due diligence study in the range of $39,000, a demand that contravened the five-percent statutory cap. To the extent the board denial was based on this ground (and it was), the denial was illegal.

The $500,000 Mitigation Fee

The $500,000 mitigation fee demanded by Messrs. Marticorena and Busch at the Clift Hotel meeting pursuant to board resolution (TX 16) was blatantly illegal — a further violation of the five-percent statutory cap. The County does not really argue otherwise but contends the demand was cloaked in a "settlement" privilege. On the facts, the Court rejects this contention. Mr. Marticorena was skilled at reducing to writing "negotiation agreements" and onerous waivers. There is no documentation of any privilege agreement. The evidence of the board resolution imposing the condition did not say it was secret, privileged, or confidential (TX 16). The Court disbelieves Mr. Marticorena's and Mr. Busch's testimony that there was an oral privilege agreement at the Clift Hotel.

Extension of the Rate Freeze

Another condition imposed at the Clift Hotel meeting was an extension of the freeze period. Recall that the Sonic transfer approval had imposed a two-year rate freeze pending completion of a rebuild. The December 15 board resolution and the Clift Hotel demands insisted on extending the freeze. This was illegal too. Federal law had in place rate-making procedures that gave rights to operators to justify rate increases and restricted LFAs' rights to regulate rates. 47

U.S.C. 543(a)(1).[9] As the FCC stated in Footnote 38, "It should be emphasized, however, that in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters." 1993 FCC Order at 6834, n.38. Santa Cruz County, Mr. Marticorena and Mr. Busch tried to do exactly what Footnote 38 and federal law prohibited.

Accordingly, both conditions (the freeze and the half-million dollar mitigation fee) violated federal law. They thus could not be reasonable, and the County's permission to the transfer was "unreasonably withheld" in violation of the Santa Cruz cable ordinance, as incorporated into the franchise agreement.[10]

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[9] In a cable system not subject to effective competition, an LFA may regulate rates for the least expensive tier of cable service, "basic service," pursuant to FCC rules and regulations. 47 U.S.C. 543(a)(2)(A) and b; 47 C.F.R. 76.922. Rates for other tiers of cable programming service, however, were subject to regulation only by the FCC pursuant to 47 U.S.C. 543(c)e. 47 U.S.C. 543(a)(2)(B); 47 C.F.R. 76.922. Under FCC regulations, cable operators could justify rate increases in either basic service or upper-tier rates under certain circumstances, such as "inflation, changes in the number of regulated channels on tiers, or changes in external costs." 47 C.F.R. 76.922(c)(2). Additionally, federal upper-tier rate regulation was "sunsetted" in 1996, Pub. L. N. 104-104, § 301(b)(1)(C)(4), 110 Stat. 56 (1996), to end on March 31, 1999. 47 U.S.C. 543(c)(4). An LFA may not try to circumscribe a cable operator's rights under this federal law. 47 U.S.C. 543(a)(1).

[10] Plaintiffs contend that Mr. Marticorena and Mr. Busch planned all along to raise marginal concerns and eventually to trade them off for illegal considerations, such as the half-million-dollar fee. The information requests, plaintiffs contend, were a mere cover for raising marginal concerns, and thus were unreasonable for this additional pretextual reason. There is plausible evidence, including testimony as to Mr. Marticorena's modus operandi in earlier transfers, to support this theory (and plausible counter evidence). In light of the foregoing disposition, however, it is unnecessary to reach the issue.

The First Amendment

Finally, this order holds that the refusal to consent violated the First Amendment The operation of a cable television franchise "plainly implicate[s] First Amendment interests." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). Under *United States v. O'Brien*, a content-neutral government regulation that results in an incidental burden on First Amendment freedom is sufficiently justified if:

> it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. 367, 377 (1968). The government bears the burden of showing that the asserted state interests are real, not merely conjectural, and that the government regulation will in fact address those interests in a direct and material way. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), *quoted in Turner Broadcasting System, Inc., v. Federal Communications Commission*, 512 U.S. 622, 662 (1994). In the cable context, the Supreme Court has explained that:

> [t]o satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" . . . Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests."

Turner Broadcasting System, Inc., v. Federal Communications Commission, 512 U.S. 622, 662 (1994) (quotations omitted).

Plaintiffs suggest that the only possible important or substantial governmental interests that local regulation of a cable operator may further are protecting public safety and maintaining public thoroughfares, for example by minimizing the physical disruption of the public domain that may occur if a cable company lacks the technical or financial resources to install and maintain a cable system safely and expeditiously. Such interests in ensuring cable operators' qualifications and regulating their infringement on public rights of way have been recognized in several cases cited by the parties. *See, e.g., Telesat Cablevision, Inc., v. City of Riviera Beach,* 773 F. Supp. 383, 394 (S.D. Fla. 1991) (citing *City of Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488, 495 (1986)); *Group W Cable, Inc., v. City of Santa Cruz,* 669 F. Supp. 954, 966, 971 (N.D. Cal. 1987); *Pacific West Cable Co. v. City of Sacramento, California,* 672 F. Supp. 1322, 1335-36 (E.D. Cal. 1987); *Carlson v. Village of Union City, Michigan,* 601 F. Supp. 801, 810-11 (W.D. Mich. 1985) (citing cases).

It is wrong, however, to say that there is no other legitimate interest that can justify government regulation of a cable operator under *O'Brien.* The Supreme Court has identified such important or substantial governmental interests as "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems," "assuring that the public has access to a multiplicity of information sources," and "eliminating restraints on fair competition," *Turner Broadcasting System, Inc., v. Federal Communications Commission,* 512 U.S. 622, 663-64 (1994), as well as raising revenue through a tax that is not directed at and does not present the danger of suppressing particular ideas, *Leathers v. Medlock,* 499 U.S. 439, 453 (1991). Other courts have recognized important or substantial governmental interests in the cable context, including regulating physical

scarcity, *Telesat Cablevision,* 773 F. Supp. at 394, 397; ensuring equal and uniform cable service, *Pacific West Cable Co.,* 672 F. Supp. at 1337; fostering local community participation, choice, expression, and communication, *Chicago Cable Communications v. Chicago Cable Commission,* 879 F.2d 1540,1549-50 (7th Cir. 1989); *Telesat Cablevision,* 773 F. Supp. at 412; fostering employment opportunities for local residents, *Chicago Cable Communications,* 879 F.2d at 1550; *Telesat Cablevision,* 773 F. Supp. at 412; protecting consumers from monopoly pricing, *Time Warner Entertainment Co., L.P., v. Federal Communications Commission,* 93 F.3d 957, 967 (D.C. Cir. 1996), and even the interest (derived from those primary interests) of "allowing municipalities to regulate cable operators without fear of potentially overwhelming damages awards," *Jones Intercable of San Diego, Inc., v. City of Chula Vista,* 80 F.3d 320, 326 (9th Cir. 1996).

This order does not endorse all of these interests as legitimate under *O'Brien.* Although some courts have recognized these interests, others have rejected some of them. *See, e.g., Century Federal, Inc., v. City of Palo Alto, California,* 648 F. Supp. 1465, 1476-77 (N.D. Cal. 1986). Certainly many of them are not applicable here. Nonetheless, they are illustrative of the narrowness of plaintiffs' contention that the County's only possible legitimate interest in the cable context is in regulating its physical rights of way.

That the County's interests are not so limited is only the beginning of the inquiry, however. Whether the County *could have* legitimate interests in regulating the cable industry and whether the County *has shown* such interests in this case are different questions. As plaintiffs note, defendant has not proffered evidence that any interest in protecting public safety, maintaining public thoroughfares or minimizing disruption of the public domain justifies the County's information demands in this case.

The County asserts an interest in ensuring continuity and quality of cable service to the franchise. In theory, this

constitutes a legitimate government interest. The First Amendment would allow an LFA to deny an application based on substantial evidence of lack of financial or technical qualification to operate a cable system. The denial resolution in question purported to deny consent on the ground that Mr. Allen had not shown that he was "financially qualified" (TX 15 at 2).

The denial was plainly wrong on this point. The materials submitted by Charter showed Mr. Allen's substantial net worth. To this, the resolution merely argued that wealth was not enough. Rather, the resolution claimed it was "also necessary to evaluate the economic reasonableness of the transaction to determine whether the transaction will impose unreasonable financial burdens upon the purchaser" (*id.* at 3-4). To have said that Mr. Allen was not "financially qualified" merely because, in his business judgment, the company was worth more than others were willing to pay was a play on words.[11]

The issue again boils down to whether it was lawful to hold up the transfer over the supposed long-term implications of the economics of the acquisition. If plaintiffs could not glean a profitable rate of return, the County reasons, rates might be raised and service could plummet or even cease.

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[11] As for technical qualification, the resolution claimed that "no evidence has been presented by the Applicants as to the Buyer's contractual commitment . . . to maintain existing Charter management and/or operating policies and procedures." In the original submission, however, the CEO of Charter, Mr. Kent, had stated to Santa Cruz County that he would remain: "The current corporate staff and system management will remain under my leadership" (TX 6 at 762). The resumes of top management were included in the submission. By failing to object to the accuracy of this statement within thirty days, the County forfeited the right to challenge it later on under 47 C.F.R. 76.502(b). The denial resolution, however, did exactly that, assuming that top management would exit and leave Mr. Allen, who had no "track record," in charge. It was unlawful under the 120-day rule for the County to raise the untimely challenge to the technical qualification of the company post-acquisition.

Hypothetically, if an existing cable operator were to attempt a transfer of the franchise to company revealed to be heavily leveraged with debt and with no track record of success, an LFA might well seek to clarify whether the proposed operator were indeed likely to crater if rates were not raised. Preventing such an eventuality would qualify as an important or substantial government interest for purposes of the First Amendment. Protecting cable subscribers from loss of service due to reasonably foreseeable failure of a cable operator is closely related both to the government interests articulated in *Turner I* and those underlying the Cable Act. This would be true regardless of whether federal law or an existing rate order would prevent a rate increase, as plaintiffs argue. If a cable operator were unable to provide decent service, subscribers would unlikely be comforted by rate guarantees.

This case, however, presents the opposite factual extreme from that hypothetical scenario. The transaction was to be accomplished without taking on any new debt; there was no realistic risk of default or of a bank having to take over; in fact Charter's existing debt was to be paid down. The company had a strong track record. The company's financial viability, years into the future, simply could not stand or fall based on the immediate nationwide acquisition price. Mr. Allen may have been willing to pay more than others because of strategic considerations or because of tax considerations or because of keen interest. Regardless of the equity invested, Mr. Allen, like any other rational business, would presumably seek to maximize profits. A company with less equity will seek to maximize its profits just as a company with more equity will. To say that the company would be under "financial stress" because it wishes to maximize profits would draw into question the financial viability of every enterprise in America. That a company will cut service or increase prices in order to maximize profits is no more likely than improving service and expanding the customer base. Absent reasonable doubt over whether the cash flow would cover debt service and payroll and other necessities of operation, it

would be hard to see any basis for questioning viability. The extreme economic fears expressed in the denial resolution were grossly disproportionate to the actual risks. The County has not met its burden of showing that any substantial government interest would be achieved less effectively absent the information demands. *See Turner Broadcasting*, 512 U.S. at 662.

The problem was exacerbated in this case by the fact that the Santa Cruz cable ordinance contained no standards whatever, either substantively or procedurally, other than to say consent might not be "unreasonably withheld." The County gave its agents unfettered discretion to scour transactions for concerns. No notice was given as to what might constitute grounds for denial or subjects for investigation. Instead the County agents made up the rules as it went. Such "regulation" lends itself to the suppression of speech.

Here there were not even vague standards. There was no standard at all. Vague or nonexistent standards "[f]irst, . . . may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, . . . may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Standards of permissible statutory vagueness are strict in the area of free expression. *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 432 (1963). Here, the County's ad hoc regulatory approach both prevented plaintiffs from anticipating and complying with the County's demands and, of equal importance, failed to restrict possible arbitrary conduct. The boundless nature of this regulation reinforces the conclusion that the County's approach burdened substantially more speech than was necessary to further its legitimate interests.

CONCLUSION

In sum, the County had promised in its franchise agreement that it would not unreasonably decline to consent to any change in ownership of the franchise. For the reasons stated, the County violated that promise. Its refusal to consent was unlawful on multiple grounds and was therefore unreasonable. Plaintiffs are entitled to declaratory judgment that the County violated the franchise agreement and the First Amendment in refusing to consent to the change in ownership. No further issues requiring disposition, the Clerk shall close the file and judgment shall be entered accordingly.

IT IS SO ORDERED.

Dated: March 7, 2001.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-15846
D.C. No. CV-99-01874-WHA(BZ)

CHARTER COMMUNICATIONS, INC., a Delaware corporation; CHARTER COMMUNICATIONS PROPERTIES, LLC, a Colorado limited liability corporation; PAUL G. ALLEN, an individual,
Plaintiffs-Appellees,

v.

COUNTY OF SANTA CRUZ,
DEFENDANT-APPELLANT.

[Filed November 15, 2002]

ORDER

Before: HAWKINS and SILVERMAN, Circuit Judges, and RESTANI,* Judge.

The panel has voted to deny the Petition for Rehearing. Judges Hawkins and Silverman have voted to deny the Petition for Rehearing En Banc and Judge Restani has recommended denying the En Banc Petition.

The full court has been advised of the Petition for Rehearing En Banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

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* The Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

The Petition for Rehearing and the Petition for Rehearing En Banc are DENIED.

APPENDIX D

STATUTES AND REGULATORY PROVISIONS

1. Section 521 of Title 47, U.S.C. provides:

§ 521. Purposes

The purposes of this subchapter are to -

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

2. Section 537 of Title 47, U.S.C. provides:

§ 537. Sales of cable systems

A franchising authority shall, if the franchise requires franchising authority approval of a sale or transfer, have 120 days to act upon any request for approval of such sale or transfer that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority. If the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time.

3. Section 541 of Title 47, U.S.C. provides:

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances

(1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

(2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure -

(A) that the safety, functioning, and appearance of the property and the convenience and safety of other

persons not be adversely affected by the installation or construction of facilities necessary for a cable system;

(B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and

(C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.

(3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority -

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3) **(A)** If a cable operator or affiliate thereof is engaged in the provision of telecommunications services -

(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and

(ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof -

(i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this subchapter with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant

of a franchise, a franchise renewal, or a transfer of a franchise.

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

(d) Informational tariffs; regulation by States; "State" defined

(1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.

(2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.

(3) For purposes of this subsection, the term "State" has the meaning given it in section 153 of this title.

(e) State regulation of facilities serving subscribers in multiple dwelling units

Nothing in this subchapter shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

(f) Local or municipal authority as multichannel video programming distributor

No provision of this chapter shall be construed to -

(1) prohibit a local or municipal authority that is also, or is affiliated with, a franchising authority from operating as a multichannel video programming distributor in the franchise area, notwithstanding the granting of one or more franchises by such franchising authority; or

(2) require such local or municipal authority to secure a franchise to operate as a multichannel video programming distributor.

4. Section 542 of Title 47, U.S.C. provides:

§ 542. Franchise fees

(a) Payment under terms of franchise

Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee.

(b) Amount of fees per annum

For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would

have lawfully been collected if such fees had been paid per annum.

(c) Itemization of subscriber bills

Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 543 of this title, as a separate line item on each regular bill of each subscriber, each of the following:

(1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.

(2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.

(3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.

(d) Court actions; reflection of costs in rate structures

In any court action under subsection (c) of this section, the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees.

(e) Decreases passed through to subscribers

Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.

(f) Itemization of franchise fee in bill

A cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill.

(g) "Franchise fee" defined

For the purposes of this section -

(1) the term "franchise fee" includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;

(2) the term "franchise fee" does not include -

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

(B) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

(C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under title 17.

(h) Uncompensated services; taxes, fees and other assessments; limitation on fees

(1) Nothing in this chapter shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable

system for which charges are assessed to subscribers but not received by the cable operator.

(2) For any 12-month period, the fees paid by such person with respect to any such cable service or other communications service shall not exceed 5 percent of such person's gross revenues derived in such period from the provision of such service over the cable system.

(i) Regulatory authority of Federal agencies

Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section.

5. Section 543 of Title 47, U.S.C. provides:

§ 543. Regulation of rates

(a) Competition preference; local and Federal regulation

(1) In general

No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.

(2) Preference for competition

If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation

by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition -

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b) of this section; and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c) of this section.

(3) Qualification of franchising authority

A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Commission a written certification that -

(A) the franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b) of this section;

(B) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

(4) Approval by Commission

A certification filed by a franchising authority under paragraph (3) shall be effective 30 days after the date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that -

(A) the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Commission under subsection (b) of this section;

(B) the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

If the Commission disapproves a franchising authority's certification, the Commission shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

(5) Revocation of jurisdiction

Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b) of this section, the Commission shall revoke the jurisdiction of such authority.

(6) Exercise of jurisdiction by Commission

If the Commission disapproves a franchising authority's certification under paragraph (4), or revokes such authority's jurisdiction under paragraph (5), the Commission

shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3). Such new certification shall be effective upon approval by the Commission. The Commission shall act to approve or disapprove any such new certification within 90 days after the date it is filed.

(7) Aggregation of equipment costs

(A) In general

The Commission shall allow cable operators, pursuant to any rules promulgated under subsection (b)(3) of this section, to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category. Such aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier.

(B) Revision to Commission rules; forms

Within 120 days of February 8, 1996, the Commission shall issue revisions to the appropriate rules and forms necessary to implement subparagraph (A).

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission -

(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

(C) shall take into account the following factors:

(i) the rates for cable systems, if any, that are subject to effective competition;

(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;

(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

(3) Equipment

The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for -

(A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and

(B) installation and monthly use of connections for additional television receivers.

(4) Costs of franchise requirements

The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of

such channels or any other services required under the franchise.

(5) Implementation and enforcement

The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include -

(A) procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

(B) procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;

(C) standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and

(D) standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

(6) Notice

The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

(7) Components of basic tier subject to rate regulation

(A) Minimum contents

Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.

(ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted additions to basic tier

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

(8) Buy-through of other tiers prohibited

(A) Prohibition

A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between

subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

(B) Exception; limitation

The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after -

(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

(ii) 10 years after October 5, 1992, subject to subparagraph (C).

(C) Waiver

If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

(c) Regulation of unreasonable rates

(1) Commission regulations

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish the following:

(A) criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;

(B) fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any franchising authority (in accordance with paragraph (3)) alleging that a rate for cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

(C) the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority under paragraph (3) and that are determined to be unreasonable.

(2) Factors to be considered

In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors -

(A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

(B) the rates for cable systems, if any, that are subject to effective competition;

(C) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

(D) the rates, as a whole, for all the cable programming, cable equipment, and cable services

provided by the system, other than programming provided on a per channel or per program basis;

(E) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

(F) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

(3) Review of rate changes

The Commission shall review any complaint submitted by a franchising authority after February 8, 1996, concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

(4) Sunset of upper tier rate regulation

This subsection shall not apply to cable programming services provided after March 31, 1999.

(d) Uniform rate structure required

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2)any video programming offered on a per channel or per program basis. Bulk discounts

to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

(e) Discrimination; services for the hearing impaired

Nothing in this subchapter shall be construed as prohibiting any Federal agency, State, or a franchising authority from -

(1) prohibiting discrimination among subscribers and potential subscribers to cable service, except that no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts; or

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.

(f) Negative option billing prohibited

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

(g) Collection of information

The Commission shall, by regulation, require cable operators to file with the Commission or a franchising authority, as appropriate, within one year after October 5, 1992, and annually thereafter, such financial information as may be needed for purposes of administering and enforcing this section.

(h) Prevention of evasions

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

(i) Small system burdens

In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.

(j) Rate regulation agreements

During the term of an agreement made before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, nothing in this section (or the regulations thereunder) shall abridge the ability of such franchising authority to regulate rates in accordance with such an agreement.

(k) Reports on average prices

The Commission shall annually publish statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment, of -

(1) cable systems that the Commission has found are subject to effective competition under subsection (a)(2) of this section, compared with

(2) cable systems that the Commission has found are not subject to such effective competition.

(l) Definitions

As used in this section -

(1) The term ''effective competition'' means that -

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is -

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

(2) The term ''cable programming service'' means any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and

(B) video programming offered on a per channel or per program basis.

(m) Special rules for small companies

(1) In general

Subsections (a), (b), and (c) of this section do not apply to a small cable operator with respect to -

(A) cable programming services, or

(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994, in any franchise area in which that operator services 50,000 or fewer subscribers.

(2) "Small cable operator" defined

For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.

(n) Treatment of prior year losses

Notwithstanding any other provision of this section or of section 532 of this title, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.

6. Section 544 of Title 47, U.S.C. provides:

§ 544. Regulation of services, facilities, and equipment

(a) Regulation by franchising authority

Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system -

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h) of this section, establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise -

(A) for facilities and equipment; and

(B) for broad categories of video programming or other services.

(c) Enforcement authority respecting franchises effective under prior law

In the case of any franchise in effect on the effective date of this subchapter, the franchising authority may, subject to section 545 of this title, enforce requirements contained within the franchise for the provision of services, facilities, and equipment, whether or not related to the establishment or operation of a cable system.

(d) Cable service unprotected by Constitution; blockage of premium channel upon request

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to

conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

(3) (A) If a cable operator provides a premium channel without charge to cable subscribers who do not subscribe to such premium channel, the cable operator shall, not later than 30 days before such premium channel is provided without charge -

(i) notify all cable subscribers that the cable operator plans to provide a premium channel without charge;

(ii) notify all cable subscribers when the cable operator plans to offer a premium channel without charge;

(iii) notify all cable subscribers that they have a right to request that the channel carrying the premium channel be blocked; and

(iv) block the channel carrying the premium channel upon the request of a subscriber.

(B) For the purpose of this section, the term ''premium channel'' shall mean any pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R.

(e) Technical standards

Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards

periodically to reflect improvements in technology. No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

(2) Paragraph (1) shall not apply to -

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this subchapter; and

(B) any rule, regulation, or order under title 17.

(g) Access to emergency information

Notwithstanding any such rule, regulation, or order, each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations.

(h) Notice of changes in and comments on services

A franchising authority may require a cable operator to do any one or more of the following:

(1) Provide 30 days' advance written notice of any change in channel assignment or in the video programming service provided over any such channel.

(2) Inform subscribers, via written notice, that comments on programming and channel position changes are being recorded by a designated office of the franchising authority.

(i) Disposition of cable upon termination of service

Within 120 days after October 5, 1992, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.

7. Section 545 of Title 47, U.S.C. provides:

§ 545. Modification of franchise obligations

(a) Grounds for modification by franchising authority; public proceeding; time of decision

(1) During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise -

(A) in the case of any such requirement for facilities or equipment, including public, educational, or governmental access facilities or equipment, if the cable operator demonstrates that

(i) it is commercially impracticable for the operator to comply with such requirement, and

(ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability; or

(B) in the case of any such requirement for services, if the cable operator demonstrates that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

(2) Any final decision by a franchising authority under this subsection shall be made in a public proceeding. Such decision shall be made within 120 days after receipt of such request by the franchising authority, unless such 120 day period is extended by mutual agreement of the cable operator and the franchising authority.

(b) Judicial proceedings; grounds for modification by court

(1) Any cable operator whose request for modification under subsection (a) of this section has been denied by a final decision of a franchising authority may obtain modification of such franchise requirements pursuant to the provisions of section 555 of this title.

(2) In the case of any proposed modification of a requirement for facilities or equipment, the court shall grant such modification only if the cable operator demonstrates to the court that -

(A) it is commercially impracticable for the operator to comply with such requirement; and

(B) the terms of the modification requested are appropriate because of commercial impracticability.

(3) In the case of any proposed modification of a requirement for services, the court shall grant such modification only if the cable operator demonstrates to the court that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

(c) Rearrangement, replacement, or removal of service

Notwithstanding subsections (a) and (b) of this section, a cable operator may, upon 30 days' advance notice to the franchising authority, rearrange, replace, or remove a particular cable service required by the franchise if -

(1) such service is no longer available to the operator; or

(2) such service is available to the operator only upon the payment of a royalty required under section 801(b)(2) of title 17, which the cable operator can document -

(A) is substantially in excess of the amount of such payment required on the date of the operator's offer to provide such service, and

(B) has not been specifically compensated for through a rate increase or other adjustment.

(d) Rearrangement of particular services from one service tier to another or other offering of service

Notwithstanding subsections (a) and (b) of this section, a cable operator may take such actions to rearrange a particular service from one service tier to another, or otherwise offer the service, if the rates for all of the service tiers involved in such actions are not subject to regulation under section 543 of this title.

(e) Requirements for services relating to public, educational, or governmental access

A cable operator may not obtain modification under this section of any requirement for services relating to public, educational, or governmental access.

(f) "Commercially impracticable" defined

For purposes of this section, the term "commercially impracticable" means, with respect to any requirement applicable to a cable operator, that it is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

8. Section 546 of Title 47, U.S.C. provides:

§ 546. Renewal

(a) Commencement of proceedings; public notice and participation

(1) A franchising authority may, on its own initiative during the 6-month period which begins with the 36th month before the franchise expiration, commence a proceeding which affords the public in the franchise area appropriate notice and participation for the purpose of (A) identifying the future cable-related community needs and interests, and (B) reviewing the performance of the cable operator under the franchise during the then current franchise term. If the cable operator submits, during such 6-month period, a written renewal notice requesting the commencement of such a proceeding, the franchising authority shall commence such a proceeding not later than 6 months after the date such notice is submitted.

(2) The cable operator may not invoke the renewal procedures set forth in subsections (b) through (g) of this section unless -

(A) such a proceeding is requested by the cable operator by timely submission of such notice; or

(B) such a proceeding is commenced by the franchising authority on its own initiative.

(b) Submission of renewal proposals; contents; time

(1) Upon completion of a proceeding under subsection (a) of this section, a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.

(2) Subject to section 544 of this title, any such proposal shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system.

(3) The franchising authority may establish a date by which such proposal shall be submitted.

(c) Notice of proposal; renewal; preliminary assessment of nonrenewal; administrative review; issues; notice and opportunity for hearing; transcript; written decision

(1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise pursuant to subsection (b) of this section, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the date of the submission of the cable operator's proposal pursuant to subsection (b) of this section, renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether -

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

(2) In any proceeding under paragraph (1), the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be

afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues raised in the proceeding under subsection (a) of this section), to require the production of evidence, and to question witnesses. A transcript shall be made of any such proceeding.

(3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision granting or denying the proposal for renewal based upon the record of such proceeding, and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor.

(d) Basis for denial

Any denial of a proposal for renewal that has been submitted in compliance with subsection (b) of this section shall be based on one or more adverse findings made with respect to the factors described in subparagraphs (A) through (D) of subsection (c)(1) of this section, pursuant to the record of the proceeding under subsection (c) of this section. A franchising authority may not base a denial of renewal on a failure to substantially comply with the material terms of the franchise under subsection (c)(1)(A) of this section or on events considered under subsection (c)(1)(B) of this section in any case in which a violation of the franchise or the events considered under subsection (c)(1)(B) of this section occur after the effective date of this subchapter unless the franchising authority has provided the operator with notice and the opportunity to cure, or in any case in which it is documented that the franchising authority has waived its right to object, or the cable operator gives written notice of a failure or inability to cure and the franchising authority fails to object within a reasonable time after receipt of such notice.

(e) Judicial review; grounds for relief

(1) Any cable operator whose proposal for renewal has been denied by a final decision of a franchising authority made pursuant to this section, or has been adversely affected

by a failure of the franchising authority to act in accordance with the procedural requirements of this section, may appeal such final decision or failure pursuant to the provisions of section 555 of this title.

(2) The court shall grant appropriate relief if the court finds that -

(A) any action of the franchising authority, other than harmless error, is not in compliance with the procedural requirements of this section; or

(B) in the event of a final decision of the franchising authority denying the renewal proposal, the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1) of this section on which the denial is based is not supported by a preponderance of the evidence, based on the record of the proceeding conducted under subsection (c) of this section.

(f) Finality of administrative decision

Any decision of a franchising authority on a proposal for renewal shall not be considered final unless all administrative review by the State has occurred or the opportunity therefor has lapsed.

(g) "Franchise expiration" defined

For purposes of this section, the term "franchise expiration" means the date of the expiration of the term of the franchise, as provided under the franchise, as it was in effect on October 30, 1984.

(h) Alternative renewal procedures

Notwithstanding the provisions of subsections (a) through (g) of this section, a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for

comment, grant or deny such proposal at any time (including after proceedings pursuant to this section have commenced). The provisions of subsections (a) through (g) of this section shall not apply to a decision to grant or deny a proposal under this subsection. The denial of a renewal pursuant to this subsection shall not affect action on a renewal proposal that is submitted in accordance with subsections (a) through (g) of this section.

(i) Effect of renewal procedures upon action to revoke franchise for cause

Notwithstanding the provisions of subsections (a) through (h) of this section, any lawful action to revoke a cable operator's franchise for cause shall not be negated by the subsequent initiation of renewal proceedings by the cable operator under this section.

9. Section 547 of Title 47, U.S.C. provides:

§ 547. Conditions of sale

(a) If a renewal of a franchise held by a cable operator is denied and the franchising authority acquires ownership of the cable system or effects a transfer of ownership of the system to another person, any such acquisition or transfer shall be -

(1) at fair market value, determined on the basis of the cable system valued as a going concern but with no value allocated to the franchise itself, or

(2) in the case of any franchise existing on the effective date of this subchapter, at a price determined in accordance with the franchise if such franchise contains provisions applicable to such an acquisition or transfer.

(b) If a franchise held by a cable operator is revoked for cause and the franchising authority acquires ownership of the cable system or effects a transfer of ownership of the system to another person, any such acquisition or transfer shall be -

(1) at an equitable price, or

(2) in the case of any franchise existing on the effective date of this subchapter, at a price determined in accordance with the franchise if such franchise contains provisions applicable to such an acquisition or transfer.

10. Section 552 of Title 47, U.S.C. provides:

§ 552. Consumer protection and customer service

(a) Franchising authority enforcement

A franchising authority may establish and enforce -

(1) customer service requirements of the cable operator; and

(2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator.

(b) Commission standards

The Commission shall, within 180 days of October 5, 1992, establish standards by which cable operators may fulfill their customer service requirements. Such standards shall include, at a minimum, requirements governing -

(1) cable system office hours and telephone availability;

(2) installations, outages, and service calls; and

(3) communications between the cable operator and the subscriber (including standards governing bills and refunds).

(c) Subscriber notice

A cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion. Notwithstanding section 543(b)(6) of this title or any other provision of this chapter, a cable operator shall not be required to provide prior notice of any rate

change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.

(d) Consumer protection laws and customer service agreements

(1) Consumer protection laws

Nothing in this subchapter shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter.

(2) Customer service requirement agreements

Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b) of this section. Nothing in this subchapter shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

11. Section 555 of Title 47, U.S.C. provides:

§ 555. Judicial proceedings

(a) Actions to review determinations by franchising authorities

Any cable operator adversely affected by any final determination made by a franchising authority under section 541(a)(1), 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination, which may be brought in -

(1) the district court of the United States for any judicial district in which the cable system is located; or

(2) in any State court of general jurisdiction having jurisdiction over the parties.

(b) Available relief

The court may award any appropriate relief consistent with the provisions of the relevant section described in subsection (a) of this section and with the provisions of subsection (a) of this section.

(c) Review of constitutionality of sections 534 and 535

(1) Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 534 or 535 of this title or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28.

(2) Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under paragraph (1) holding section 534 or 535 of this title or any provision thereof unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

12. Section 76.502 of Title 47, C.F.R. provides:

§ 76.502 Time limits applicable to franchise authority consideration of transfer applications.

(a) A franchise authority shall have 120 days from the date of submission of a completed FCC Form 394, together with all exhibits, and any additional information required by the terms of the franchise agreement or applicable state or local law to act upon an application to sell, assign, or otherwise transfer controlling ownership of a cable system.

(b) A franchise authority that questions the accuracy of the information provided under paragraph (a) must notify the cable operator within 30 days of the filing of such information, or such information shall be deemed accepted, unless the cable operator has failed to provide any additional information reasonably requested by the franchise authority within 10 days of such request.

(c) If the franchise authority fails to act upon such transfer request within 120 days, such request shall be deemed granted unless the franchise authority and the requesting party otherwise agree to an extension of time.

13. Section 76.910 of Title 47, C.F.R. provides:

(a) A franchising authority must be certified by the Commission in order to regulate the basic service tier and associated equipment of a cable system within its jurisdiction.

(b) To be certified, the franchising authority must file with the Commission a written certification that:

(1) The franchising authority will adopt and administer regulations with respect to the rates for the basic service tier that are consistent with the regulations prescribed by the Commission for regulation of the basic service tier;

(2) The franchising authority has the legal authority to adopt, and the personnel to administer, such regulations;

(3) Procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties; and

(4) The cable system in question is not subject to effective competition. Unless a franchising authority has actual knowledge to the contrary, the franchising authority may rely on the presumption in Sec. 76.906

that the cable operator is not subject to effective competition.

(c) The written certification described in paragraph (b) of this section shall be made by filing the FCC form designated for that purpose. The form must be filed by

(1) Registered mail, return receipt requested, or

(2) Hand-delivery to the Commission and a date-stamped copy obtained. The date on the return receipt or on the date-stamped copy is the date filed.

(d) A copy of the certification form described in paragraph (c) of this section must be served on the cable operator before or on the same day it is filed with the Commission.

(e) Unless the Commission notifies the franchising authority otherwise, the certification will become effective 30 days after the date filed, provided, however, that the franchising authority may not regulate the rates of a cable system unless it:

(1) Adopts regulations:

(i) Consistent with the Commission's regulations governing the basic tier; and

(ii) Providing a reasonable opportunity for consideration of the views of interested parties, within 120 days of the effective date of certification; and

(2) Notifies the cable operator that the authority has been certified and has adopted the regulations required by paragraph (e)(1) of this section.

(f) If the Commission denies a franchising authority's certification, the Commission will notify the franchising authority of any revisions or modifications necessary to obtain approval.

Supreme Court, U.S.
MAR 28 2003
CLERK

No. 02-1267

In the

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC., a Delaware corporation; CHARTER COMMUNICATIONS PROPERTIES, LLC, a Colorado limited liability corporation; and PAUL G. ALLEN, an individual,

Petitioners,

v.

SANTA CRUZ COUNTY, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

Respondent County of Santa Cruz respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case, reported at 304 F.3d 927 (2002). (App. at 1a-13a.)[1] The Ninth Circuit's opinion merely affirms well established principles under the separation of powers doctrine requiring judicial deference in the review of legislative acts. Contrary to Petitioners' assertions, affording deference neither conflicts with any national policy established by the Cable Act nor creates confusion in lower courts regarding the standard for reviewing local government acts in the cable television context.

Further, no significant free speech issues are raised by the opinion, which affirms that the deferential standard applies even when First Amendment rights are implicated. The Ninth Circuit's comments, in dicta, concerning waivers merely confirm that with regard to franchise transfers, franchisees are subject to the standard of review for which they freely contracted in their franchise agreements.

The application of these well established principles of judicial review is even more compelling here, for unlike the cases cited by Petitioners, this case does not concern an attempt by the County to condition the transfer of the subject franchise on improper concessions. Rather, it involves mere *requests for information* the County believed necessary to evaluate an application for government privileges, and the consequent denial of that privilege when the information

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[1] Citations in the form of "App. __" are to page numbers in the appendix to Petitioners' petition.

requests were refused and Petitioners otherwise failed to establish their financial and technical qualifications.

STATEMENT OF THE CASE

1. The Sonic-Charter Transaction

Petitioner Charter Communications Properties, LLC ("Charter"), a subsidiary of Petitioner Charter Communications, Inc. ("CCI"), holds a cable franchise for the southern unincorporated areas of the County ("Franchise"). Charter originally took over the Franchise from Sonic Cable Communications, Inc. ("Sonic") on May 19, 1998, after negotiations with, and approval by, the County.[2] Under the Franchise documents, Charter agreed to make extensive capital improvements, including a rebuild of the entire cable system. Charter's acquisition price for Sonic's systems was *$1,564 per subscriber*. (App. at 24a.) During negotiations, Charter specifically advised the County that the Franchise would be *only marginally profitable at that purchase price*. (Ct. App. ER at 664, 743-744.)[3]

2. The Charter-Allen Transaction

Only two months later, Petitioner Paul Allen contracted with CCI to purchase the company at an overall price of *$3,600 per subscriber*, more than twice the amount Charter had paid Sonic, and the most expensive price paid for a franchise nationwide. (App.

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[2] All of the pertinent events described herein took place in 1998.

[3] Citations in the form of "Ct. App. ER __" are to page numbers of Appellant's Excerpts of Record submitted to the Ninth Circuit. Respondent will provide the Court with copies of the materials cited herein should the Court so request.

at 24a.) Mr. Allen did not pledge any of his personal assets to any of the Franchise's obligations or debt. (Ct. App. ER at 76-77, 356, 649-650.)

On August 18th, Petitioners requested the consent of the County and other franchising authorities to the proposed transfer by submitting copies of FCC Form 394 ("Form 394"), the Federal Communications Commission form required to initiate such transfers. In light of the just-closed Sonic-Charter transaction and Mr. Allen's recent purchase of another large cable system, Marcus Cable, Allen's proposed take-over of CCI raised several "red flags," including: the high acquisition price and its potential impact on rates and services (especially given Charter's representations that the Franchise was only marginally profitable at the much lower acquisition price); the stability of management (Marcus lost several top executives after Allen's take-over); and the operational impacts of the proposed roll-up into one company of CCI and Marcus.

Because the Cable Act required the County to act within 120 days of submission of the Form 394, *i.e.*, by December 16th, the County quickly sought information it thought pertinent to the transfer. A week after receiving the Form 394, County staff met with Petitioners and requested that they address the "red flag" issues by funding a due diligence financial report by a mutually acceptable independent consultant. (Ct. App. ER at 692-693, 696-697, 698-700.) Thus, contrary to Petitioners' assertion that the County *insisted* that Petitioners fund a report, the County merely *requested* that this be done. The County never ruled out any other methods by which Petitioners could address its concerns, and Petitioners never suggested an alternative

method of doing so.[4]

A week after the meeting, the County sent Petitioners an information request concerning the transfer. Petitioners provided some information in response, but put off formally committing to the financial report. After several weeks, the County became concerned that it would not receive the information necessary to evaluate the transfer. Thus, on November 2nd, it sent Petitioners a second information request, asking follow-up questions regarding responses to the first request, and seeking further explanation of management and financial issues. The County also suggested that Petitioners directly retain a consultant and submit their own financial report.[5] (Ct. App. ER at 705-706, 713-714, 318-334.)

Shortly before the December deadline for County action, Petitioners repudiated their earlier representations and for the first time advised the County that they would neither participate in a due diligence study nor respond to the second information request, claiming that franchising authorities could not legally

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[4] Although Petitioners initially quibbled with the need for a study and with who would prepare it, they led the County to believe they would perform one. (App. at 27a, 63a; Ct. App. ER at 211.) Ultimately, Petitioners decided not to participate in a study or to provide certain requested information, asserting that under the Cable Act the County was foreclosed from asking for any information outside of that provided in the Form 394. The district court categorically rejected this assertion (App. at 58a-59a), and Petitioners abandoned the issue on appeal. (*See, also*, Petition at 12, n. 5, where Petitioners concede that additional information beyond the Form 394 may be requested by local authorities.)

[5] Ironically, Mr. Allen had caused such a due diligence report to be prepared in *July 1998* by NationsBanc Montgomery Securities. Petitioners, however, did not offer it for the County's review. (Ct. App. ER at 518-641.)

ask for information in addition to that provided in the Form 394.[6] Instead, Petitioners offered *to negotiate "conditions of approval"* with the County *outside of the Form 394 process.* (App. at 40a; Ct. App. ER at 645, 714-717.) The County requested that Petitioners reconsider their position, but Petitioners refused to do so. (Ct. App. ER at 338-348.)

Faced with this recalcitrance and the looming deadline, the County Board of Supervisors ("Board") on December 8th, adopted Resolution No. 445-98, comprised of nine pages of findings and 88 pages of exhibits, denying consent to the transfer without prejudice. ***Contrary to Petitioners' repeated assertions that the County's denial was based on Petitioners' refusal to agree to a rate freeze or to pay a $500,000 mitigation fee to the County*** (Petition at 2, 4-5, 6), ***the Resolution contains no mention whatsoever of such matters.*** (Ct. App. ER at 349-447.) Rather, the Resolution contains 22 separate paragraphs identifying a host of issues that were insufficiently addressed by Petitioners, and expressly provides that the denial was based on Petitioners' failure (i) to respond to the second information request; (ii) to cooperate in the County's due diligence investigation; and (iii) to otherwise address the "red flag" issues or to affirmatively demonstrate their technical and financial qualifications to operate the cable system. (*Ibid.*)

After the Board's denial, Petitioners hired an attorney who had previously worked with the County to solicit conditions from the County for granting its consent. The attorney urged the County to negotiate, warning the County that (i) under no circumstances

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[6] See footnote 4, *supra.*

would Petitioners provide any more evaluative information or otherwise justify the viability of the transaction; (ii) Petitioners would close the transaction by the end of 1998 whether or not the County consented; and (iii) a failure to reach a mutually acceptable resolution of the matter would result in a "big fight." (App. at 40a.) Recognizing it would not receive the information it needed to properly evaluate the transfer, but wanting to avoid the threatened litigation, the Board determined to respond to Petitioners. It did so, however, only on terms that would mitigate the transfer's impacts on rates and services, *i.e.*, it would consent only if Petitioners agreed to temporarily freeze rates and to make a payment into an existing subscriber protection fund, which would be available to address any adverse impacts that might be suffered by subscribers. Petitioners rejected those terms.

Thus, contrary to Petitioners' characterization of events, the County's post-denial rate freeze and payment proposals were not *demands*, but were part of a negotiation *solicited by Petitioners* after they had refused to participate in the prescribed Form 394 process. Because these proposals were made well *after* the Board's denial of consent on December 8th, Petitioners' rejection of the proposals could not have formed any basis for the denial itself, and thus the proposals were legally irrelevant.[7]

When those settlement attempts failed, Petitioners violated the County's ordinance and the Franchise by closing their transaction without the Board's consent and, as promised, sued the County.

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[7] This post-denial "evidence" also should have been excluded under Federal Rule of Evidence 408 [settlement statements inadmissible].

REASONS FOR DENYING THE WRIT

I. THE RULING DOES NOT CONFLICT WITH NATIONAL POLICY UNDER THE CABLE ACT

The statutory provisions pertinent to the cable television issues involved here are found at 47 U.S.C. sections 521 *et seq.* (collectively, "the Act"). Petitioners assert that the Act and its implementing FCC regulations establish a national policy concerning cable communications which severely restricts the role of local government in the regulation of cable television transfers. Accordingly, it was error for the Ninth Circuit to afford any deference to the County's denial of the subject franchise transfer, as this undercut that national policy.

Petitioners' argument significantly overstates the scope and preemptive effect of the national policy established by the Act. Although a purpose of the Act was to "establish a national policy concerning cable communications" (47 U.S.C. § 521), that policy was intended to *clarify* the existing system of local, state, and Federal regulation of cable television, *not to preempt local regulation.* (H.R.Rep. No. 98-934 at 19, 23, *reprinted in* 1984 U.S. Code Congressional & Administrative News ("U.S.C.C.A.N.") at 4656, 4660 ("House Report").) The House Report specifically acknowledges that the Act recognizes "the *authority of local governments* to regulate cable television through the franchise process," and preserves "the *critical role of municipal governments in the franchise process,* while providing appropriate deregulation *in certain respects* to the provision of cable service." (*Id.* at 4656, emphasis added.)

The Act, itself, expressly provides that it does not affect the regulatory authority of state and local entities regarding matters of public welfare, and preempts only local provisions that are *inconsistent* with the Act. (47 U.S.C. §§ 556, 554.) Congress and the FCC have deemed it necessary to preempt only certain areas of cable regulation (*e.g.*, signal carriage, technical standards, rates) to promote the development of cable into a national communications structure. Other areas, including franchising and transfers, have been expressly left to local control. As the House Report plainly states:

> It is the Committee's intent that the franchise process take place *at the local level where city officials have the best understanding of local communications needs* and can require cable operators to tailor the cable system to meet those needs.

(House Report, 1984 U.S.C.C.A.N. at 4661, emphasis added.)

Similarly, the FCC has acknowledged that "local authorities are most familiar with individual cable operators and franchise agreements and are better positioned to evaluate the effects of a proposed transfer on cable rates and service." (*In re Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection & Competition Act of 1992*, FCC Report & Order at ¶ 36, FCC 93-332, MM Docket No. 92-264 (1993) ("1993 Report & Order").) As for the information franchising authorities may seek in connection with their franchising activities, the FCC has stated that in addition to the Form 394, which initiates a franchise transfer request, "[l]ocal authorities may request additional information reasonably necessary to

determine the qualifications of the proposed assignee or transferee." (*Id.* at ¶ 4.)

Petitioners cite to nothing in the Act or regulations that purports to preempt a franchising authority from exercising its discretion in connection with a request for consent to a franchise transfer. Nor do they cite to any substantive limitations or standards that govern the approval of transfers. The reason is clear: The Act places no substantive limitations on franchising authorities in connection with franchise transfers, requiring only, under section 537, that they act on a request within 120 days of its submission. (47 U.S.C. § 537.) Indeed, in awarding, renewing, or approving the transfer of a franchise, local franchising authorities are authorized under the Act to request such information that they deem necessary and to require adequate assurance that the proposed cable operator has the financial, technical, and legal qualifications to provide cable service. (47 U.S.C. §§ 537, 541(a)(4)(C), 546(c).) As plainly stated in the House Report regarding franchise transfers:

> [Section 537] is *not intended to limit, or give the FCC authority to limit, local authority to require* in franchises that cable operators provide *additional information* or guarantees with respect to a cable sale or transfer. [I]t also is *not intended to limit, or give the FCC authority to limit, a franchise authority's right to grant or deny a request for approval of a sale or transfer, in its discretion,* consistent with the franchise and applicable law.

(House Rep. No. 102-628 at 120-121 (1992), emphasis

added.)

The FCC has also specifically recognized that the Act involves only procedural limitations. Section 537 does *not* require the FCC to adopt "substantive standards governing the approval of transfers," in contrast to other statutory provisions that do preempt local authority, such as those regarding rate regulation and franchise fees. (1993 Report & Order at ¶ 39, n. 38.) The district court agreed. (App. at 58a-59a.)

Thus, contrary to Petitioners' assertions, part of the national policy of the Act and its implementing regulations is to *preserve the critical role of franchising authorities in the franchising process.* Affording judicial deference to their determinations as to what information is necessary to evaluate the qualifications of a proposed transferee *promotes*, rather than hinders, that national policy.

None of the cases cited in the Petition suggest otherwise. Indeed, the only reported case addressing this issue contradicts Petitioners' position. (*Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434, 441 (6th Cir. 1997) ["Nothing in the Cable Act suggests that Congress intended to eliminate judicial deference to a municipality's legislative acts."]) Rather than deal with standard of review issues, the cases cited by Petitioners all concern issues of preemption or statutory interpretation. Those issues are questions of law, which are reviewed *de novo;* consequently, the cases are irrelevant to the issue of whether it is appropriate to afford deference to the consent decisions of franchising authorities. Here, the issue is not whether the imposition of a particular condition was preempted or otherwise foreclosed by statute; rather, the issue is whether a franchising authority's determination to seek

additional information in connection with a transfer request, and to deny its consent when substantive issues go unaddressed, was entitled to deference.

In citing *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984), Petitioners have smuggled a Trojan Horse into their own camp, for the case expressly contradicts their argument that the Act has so limited the discretionary role of franchising authorities that no deference is due their decisions. There, this Court held that the application of an alcohol advertising ban to out-of-state cable signals was *preempted*. Of particular significance to Petitioners' argument here, however, is the Court's discussion of the Act's national policy:

> In making the boundaries of its jurisdiction, the FCC . . . announced a program of "deliberately structured *dualism*" in which *state and local authorities were given responsibility for granting franchises to cable operators within their communities*. . . . At the same time, the Commission retained exclusive jurisdiction over all operational aspects of cable communications, including signal carriage and technical standards.

(*Id.* at 702, emphasis added.) Whereas the FCC has determined that national communication policy would be undermined were local governments permitted to regulate in piecemeal fashion the signals carried by cable operators, no such determination has been made regarding franchisee selection, whether by way of initial entry or purchase. As the Court noted, that area has not been preempted and remains the responsibility of franchising authorities. (*Id.* at 703, n. 8, 704.)

City of New York v. FCC, 486 U.S. 57 (1988), another preemption case, is equally unavailing. This Court held there that the FCC did not exceed its statutory authority in preempting state and local technical standards governing the quality of cable signals. (*Id.* at 59-60.) The FCC, however, has not preempted the transfer approval process. Indeed, as the opinion expressly states, "[t]he Cable Act left franchising to state and local authorities." (*Id.* at 61.)

Nor do the other cases cited in the Petition have relevance here. *Time Warner v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), holds that the Act preempted the regulation of certain rates and programming requirements. (*Id.* at 188, 198.) The instant action concerns neither of those subjects.[8] *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), another preemption case, concerns section 253 of the Federal Telecommunications Act of 1996, which has no application to cable television. *Time-Warner Cable v. Bloomberg L.P.*, 118 F.3d 917 (2nd Cir. 1997), deals with statutory interpretation and the operational aspects of cable television, not franchising. *Tribune-United Cable of Montgomery County v. Montgomery County*, 784 F.2d 1227 (4th Cir. 1986), merely holds that under the Act, an operator's application for modification of franchise requirements automatically stays a franchising authority's ability to enforce penalty provisions under the franchise agreement. *City of Ottawa v. Sammons Communications, Inc.*, 836 F.Supp. 555 (N.D. Ill. 1993), a district court case, barred franchising authorities that had failed to comply with certain statutory prerequisites from challenging rates charged by a cable operator. (*Id.*

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[8] As stated, the County's post-denial rate freeze proposal was in response to Petitioners' attempts to negotiate a settlement of the transfer dispute. It was not a part of the Form 394 review process and was not a basis for the County's denial.

at 565.) Finally, *Jones Intercable, Inc. v. City of Stevens Point*, 729 F.Supp. 642 (W.D. Wis. 1990), another district court preemption case, simply holds that under the Act, franchising authorities were not authorized to require operators to carry specific cable services. (*Id.* at 650.)

As is plainly evident, none of these cases support Petitioners' assertions regarding the deferential review of consent decisions.[9]

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[9] Petitioners also refer to recent cable mega-mergers involving AT&T as reason to grant certiorari. They claim that such mergers require the consent of hundreds of franchising authorities, which, under the Ninth Circuit's ruling, will somehow be allowed to assert "pretextual concerns" in order to extort illegal concessions, thereby dramatically impacting the cable industry. (Petition at 28-29.) Of course, nothing in the Ninth Circuit's ruling allows local government to "extort" anything. Moreover, Petitioners' argument highlights, rather than negates, the need for local government review of proposed transfers, for the referenced mergers demonstrably exposed hundreds of franchising authorities and millions of cable subscribers to increased risks. After its merger with TCI, AT&T suffered a drastic decline in its stock prices, and it defaulted on many of its franchise obligations (*e.g.*, falling behind schedule in upgrading its cable networks) due to an admitted "capital crunch." ("AT&T Broadband: A Hard Sell," Lisa DiCarlo, *Forbes.com*, October 25, 2001.) Similarly, as chronicled in a recent *Wall Street Journal* article, Charter is now "overleveraged and underperforming," due in part to diminishing revenues from small and midsized cable systems. ("Paul Allen's in Danger of Losing His Charter," Peter Grant, *The Wall Street Journal*, January 29, 2003.) As recognized by the Ninth Circuit, such financial struggles could well impact the cost, quality, and range of cable services available to subscribers in the County. (App. at 9a.) Thus, the events to which Petitioners refer validate the County's concerns, not Petitioners'.

II. THERE IS NO CONFUSION AS TO THE APPLICATION OF DEFERENCE IN THE CABLE CONTEXT

Citing more preemption cases, namely *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir. 2001), *Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991), and *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), Petitioners assert that because no special deference was afforded the franchising authorities in those cases, those cases conflict with cases like *Communications Systems, Inc. v. City of Danville*, 880 F.2d 887 (6th Cir. 1989) and *Union CATV, Inc. v. City of Sturgis, supra*, 107 F.3d 434, where deference was afforded. This argument misses the mark because it equates the standard of review in preemption cases with the standard of review of discretionary acts.

Preemption cases concern the primacy of Federal laws over competing or related state laws. The analysis in such cases begins with the text of the Federal statute to determine the scope of the preemption, and then determines whether the challenged action falls within that scope. (*See, Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996).) If it does, the action is disallowed. For example, because the Cable Act preempts the regulation of (i) Internet access and (ii) the number of cable systems that can be owned, *MediaOne, Cable Alabama*, and *AT&T* held that conditioning approval of a transfer on the franchisee's granting open access to Internet service providers or denying a transfer where the transferee owned other local cable systems, violated the Act. The legitimacy of the franchising authorities' decisions in those cases depended on the *de novo* review of a statute, not on whether deference was afforded the decisions. Because deferential review was

not an issue in those cases, they do not conflict with cases that do accord deference.

On the other hand, the *City of Danville* and *Union CATV* cases concern the award or renewal of a franchise, discretionary actions that are *not* preempted under the Act. Because the courts there were reviewing discretionary actions, rather than statutory provisions, the franchising authorities' decisions were entitled to deference.[10] (880 F.2d at 891; 107 F.3d at 441.) Thus, there is no confusion in the lower courts as to when to accord deference to local government acting in the cable area.

III. THE NINTH CIRCUIT HAS NOT CREATED A RULE THAT BY CONTRACTING WITH GOVERNMENT, A SPEAKER WAIVES ALL FIRST AMENDMENT RIGHTS

Petitioners argue that the Ninth Circuit's ruling will "preclude any First Amendment challenge to the possibly unconstitutional acts of local governments against cable franchisees." (Petition at 17.) A balanced reading of the Ninth Circuit's analysis does not support such a drastic conclusion. In performing its First Amendment analysis, the Ninth Circuit *first* applied the test established by *United States v. O'Brien*, 391 U.S. 367 (1968), under which a content-neutral regulation withstands attack if it furthers an important or

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[10] Because of special policy considerations (*see*, House Report, 1984 U.S.C.C.A.N. at 4662), the Act prescribes the higher "preponderance of the evidence" standard of review for franchise *renewals*. (47 U.S.C. § 546 (e).) The more deferential "arbitrary/capricious" standard applies to the review of legislative actions such as franchise *grants* and *transfers*. (*See, Orange County Cable Communications Co. v. City of San Clemente*, 59 Cal.App.3d 165, 174, 130 Cal.Rptr. 429 (1976).)

substantial government interest that is unrelated to the suppression of free expression. (*Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).) Specifically, the Ninth Circuit held:

> Finally, since the County's judgment was *reasonable*, it necessarily follows that its decision to deny the transfer on the basis of that judgment was supported by *a legitimate governmental interest.*

(App. at 11a, emphasis added.) By effectively merging the assessment of "reasonableness," the franchise agreement's contractually agreed-to standard of review, with the "legitimate government interest" test under *O'Brien*, the Ninth Circuit heeded this Court's repeated directives that courts should not stray from a deferential standard of review of legislative actions, even when First Amendment rights are implicated.[11] (*City of Los Angeles v. Alameda Books*, 122 S.Ct. 1728, 1736 (2002), *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 678 (1996); *One World One Family Now v. Honolulu*, 76 F.3d 1009, 1113 (9th Cir. 1996).)

Significantly, only *after* holding that the County's reasonable conduct passed *O'Brien's* legitimate government interest test did the Ninth Circuit note, in dicta, that Charter had waived any right to argue that a higher standard applied to the franchise transfer simply

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[11] *O'Brien* also requires that the "regulation promote[] a substantial government interest that would be achieved less effectively absent the regulation." (*Ward v. Rock Against Racism*, 491 U.S. 781, 799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985).) The County, however, had only two options on the transfer application, approve or deny, and the only option that would have advanced any of the interests acknowledged by the Ninth Circuit was denial.

because a First Amendment issue was potentially involved:

> Charter voluntarily entered into an agreement under which the County had to approve any transfer of the franchise, and thus, *to that extent*, waived its right to claim that a denial of a transfer violated its First Amendment rights.

(App. at 11a-12a, footnote omitted, emphasis added.) Explaining further, the court stated that: (i) a waiver of constitutional rights can be implied from the terms and conditions of a contract where the party claiming the right is sophisticated and represented by counsel (*Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1314 (8th Cir. 1991)); and (ii) public policy militates in favor of enforcing the "reasonableness" standard set forth in the Franchise agreement because the County should "be careful in its role as steward." (App. at 12a, n. 9.) From this analysis flows the very same conclusion that flows from the Ninth Circuit's application of the *O'Brien* test: The "reasonableness" standard of the Franchise agreement guides the First Amendment analysis of the County's transfer denial.[12]

The Ninth Circuit's ruling does not, as Petitioners claim, provide such unbridled discretion so as to "grant the County the ability to act unlawfully or unconstitutionally." (Petition at 19, citing *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).) On the contrary, the ruling simply states that Charter waived its

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[12] Because they agreed to the "reasonableness" standard in the Franchise agreement, Petitioners are likewise barred from challenging that standard on vagueness grounds.

right to claim the transfer denial must be *more than reasonable* to pass Constitutional muster, a claim rejected by the court under its *O'Brien* analysis. (App. at 11a.)

Nor did the Ninth Circuit "create a rule that by entering into a contract with the government, a speaker waives *all* rights to challenge the government's actions on First Amendment grounds." (Petition at 20, emphasis added.) The court merely affirmed that sophisticated parties represented by counsel will be held to the terms and standards expressly set forth in their contracts regarding franchise transfers. Nothing in the ruling suggests that by agreeing to a standard of review for *franchise transfers*, Charter somehow waived its First Amendment rights relating to *programming content, channel lineup, or any of the other variety of speech-related activities that arise in the cable television context.*[13]

Finally, the claim that the Ninth Circuit's analysis somehow implies a waiver of Mr. Allen's First Amendment rights finds no support in the ruling. The court did not purport to extend the waiver analysis of footnote 9 to Mr. Allen because his rights were sufficiently addressed under the *O'Brien* analysis, where the court found that the transfer denial advanced the County's legitimate government interests. Mr.

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[13] Petitioners' suggestion that a local government's undue leverage makes franchise negotiations inappropriate for finding constitutional waiver is supported neither by the facts of this case nor Petitioners' cited authority, *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989). That case *did not decide* whether a First Amendment waiver could be construed from the franchise agreement because the issue of "unequal bargaining power" *had not been raised* by either of the parties. (*Id.* at 1548, n. 6.)

Allen's rights relating to the transfer evaluation process could not have been any greater than Charter's, as he was seeking to assume Charter's position under the Franchise agreement.

IV. IN DENYING ITS CONSENT TO THE TRANSFER, THE COUNTY ACTED LEGISLATIVELY

Finally, Petitioners assert that deference should not have been afforded the County's denial of consent because, rather than being legislative in nature, the denial was merely an administrative act under a contract. A franchise, however, is more than simply a contract; it is a special privilege conferred for the use of a sovereign body's property. It is reserved for public control by the government and is subject to such conditions and regulations as the government may impose in the public interest and for the public security. (*California v. Central Pac. R. Co.*, 127 U.S. 1, 40-41 (1888); *Southern Pacific Pipe Lines, Inc. v. City of Long Beach*, 204 Cal.App.3d 660, 666, 251 Cal.Rptr. 411 (1988).)

As found by the Ninth Circuit, franchise grants, renewals, and consents to rate increases are all legislative acts. Although Petitioners criticize that court for citing no supporting precedent (Petition at 23), the reason is self-evident: Petitioners *conceded* those points. (App. at 5a.) In any event, a myriad of cases so hold. (*Pacific Rock & Gravel Co. v. Upland*, 67 Cal.2d 666, 668, 63 Cal.Rptr. 572 (1967) [franchise *grant* is a legislative act]; *Golden State Transit Corporation v. City of Los Angeles*, 754 F.2d 830, 834 (9th Cir. 1985), *rev'd on other grnds.*, 475 U.S. 608 (1986) [franchise *renewal* is a legislative act]; *Orange County Cable Communications Co. v. City of San Clemente*, *supra*,

59 Cal.App.3d at 171 [denial of consent to *rate increase* is a legislative act]; *see, also, Oakland R. Co. v. Oakland, B., & F.V.R. .Co.*, 45 Cal. 365, 379 (1873) [whether a franchisee can *assign* a portion of its franchise is a matter which concerns the public alone].)

This is true for cable television franchises in particular. (*Monarch Cablevision, Inc. v. City Council*, 239 Cal.App.2d 206, 210, 48 Cal.Rptr. 550 (1966); *Communications Systems, Inc. v. City of Danville, supra*, 880 F.2d at 891, 892; Cal. Government Code § 53066(b) [county *may* award a cable franchise on any consideration that "will safeguard the local public interest"]; *City of Lafayette v. American Television & Communication Corp.*, 98 Cal.App.3d 27, 36, 159 Cal.Rptr. 271 (1979) ["It is wholly appropriate for the county, under the delegation represented by Government Code section 53066, to make its own *legislative* determination of what the public interest is and requires; a court's view of the public interest cannot in any event supplant that of the appropriate legislative body. . . ."].)

Petitioners offer no basis for treating franchise *transfer consents* differently. If anything, transfers are more clearly legislative than renewals. With *renewals*, a franchising authority has restricted discretion under the Act (47 U.S.C.§ 546) and it evaluates a *known* quantity, the incumbent franchisee. With *transfers*, a franchising authority's discretion is statutorily unrestricted and it evaluates a *new* entity operating under different financial and management circumstances.

Here, it was proposed that Paul Allen take control of the franchise. As virtually the sole owner of CCI, Mr. Allen, who had little experience in providing cable services, was to be actively involved in strategic

planning with respect to operations, technology, and expansion of cable operations. (Ct. App. ER at 653.) And, he was proposing to pay the highest acquisition price ever paid for a system, which could potentially impact rates and services. Thus, Allen's take-over was a fundamental change that could impact all subscribers and potential subscribers in the franchise area. Because the ultimate question of whether the transfer should be approved *impacted the community as a whole*, it was clearly a political decision shaped by discretion and public policy, and thus legislative in nature. (*See, Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 523, 169 Cal.Rptr. 904 (1980) [rezoning of just three parcels is a legislative act because it potentially impacted many people and character of community]; *Anaheim Redevelopment Agency v. Dusek*, 193 Cal.App.3d 249, 259-260, 239 Cal.Rptr. 319 (1987) [condemnation of single parcel is a legislative act as it required balancing of owner's interests against a policy adopted to improve the quality of life for agency's "larger constituency"].)

Contrary to Petitioners' claim, the parties' contractual relationship did *not* convert otherwise legislative actions into administrative ones. In *Orange County Cable Communications Co. v. City of San Clemente, supra*, 59 Cal.App.3d 165, the court held that having once granted a franchise, the council *continued to act in its legislative capacity* in denying a rate increase pursuant to the terms of the franchise. (*Id.* at 171.) Although the city had a contractual duty to act in good faith in deciding rate issues, this did not transform the nature of the city's action from legislative to non-legislative. (*Id.* at 172.) Thus, even though the parties' relationship was contractual, the city's actions were reviewable under the arbitrary/capricious standard. (*Id.* at 174; *accord, Santa Margarita Area Residents*

Together v. San Luis Obispo County Bd. of Supervisors, 84 Cal.App.4th 221, 227, 233, 100 Cal.Rptr.2d 740 (2000) [county's regulatory discretion was not limited by development agreement that contemplated future discretionary approvals].)

Further, the provision of the franchise agreement governing transfers was incorporated from the County's Franchise Ordinance, which requires the Board's prior consent. The Ordinance imbues the Board with substantial discretion in granting franchises (decisions are governed by "the public interest") and in granting consent to transfers (consent cannot be "unreasonably withheld"). This legislative discretion cannot be contracted away. (*Southern California Gas Co. v. Los Angeles*, 50 Cal.2d at 713, 718, 329 P.2d 289 (1958).) Indeed, by incorporating the Ordinance's consent provision into the franchise agreement, the parties *expressly retained* the County's broad discretion over transfers. Thus, the Court owed deference to the Board's basic policy decision. (*Lynch v. San Francisco*, 3 Cal.2d 141, 142 (1935).)

The Board, as the legislative branch of County government, "is entitled to the exercise of discretion in judging facts which constitute the basis of its resolutions and ordinances." (*California Assn. of Professional Employees v. County of Los Angeles*, 74 Cal.App.3d 38, 43, 141 Cal.Rptr. 290 (1977).) Consistent with the Ordinance, the Board specifically found that "it would not be *in the public interest* to approve the Transfer at this point in time. . ." and that "it would be *in the public interest* to disapprove the Transfer. . . ." (Ct. App. ER at 350.) In deciding whether the transfer was "in the public interest," the Board's determinations were judgmental as well as factual, implicating issues that bore on its constituents as a whole.

Petitioners suggest a formulaic approach to determining whether an action is legislative: It is legislative only if it sets forth a policy for future cases. This is not helpful because the distinction between legislative and adjudicatory determinations is not so simplistic. (*Joint Council of Interns & Residents v. Board of Supervisors*, 210 Cal.App.3d 1202, 1209, 258 Cal.Rptr. 762 (1989); *see*, *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal.App.2d 271, 279, 63 Cal.Rptr. 889 (1967) [presence of elements characteristic of judicial process does *not* make action quasi-judicial; board acted in legislative capacity *in denying requests for consent* to annexation of certain lands even though board acted in response to specific petitions, with regard to specific parties and after hearing evidence]; *Santa Ana Tustin Community Hospital v. Board of Supervisors*, 127 Cal.App.3d 644, 652, 653, 179 Cal.Rptr. 621 (1982) [board's designation of hospitals as "trauma centers," after performing studies, receiving evaluations from experts, and holding meetings, was legislative act reviewable under arbitrary/capricious standard]; *Mike Moore's 24-Hour Towing v. City of San Diego*, 45 Cal.App.4th 1294, 1303, 53 Cal.Rptr.2d 355 (1996) [award of contract is a legislative act].)

Thus, as a rule, where government exercises discretion *guided by considerations of public welfare*, its action is legislative. (*Joint Council of Interns & Residents v. Board of Supervisors*, *supra*, 210 Cal.App.3d at 1211.) That is precisely what the Board did here. (*See*, *Cox Cable San Diego, Inc. v. City of San Diego*, 188 Cal.App.3d 952, 967, 233 Cal.Rptr. 735 (1987) ["[c]able television has been determined to be an industry affected with the public welfare"].)

None of the cases cited by Petitioners support their position. In *Wojcik v. City of Romulus*, 257 F.3d

600 (6th Cir. 2001), the city refused to permit the transfer of an entertainment permit because the proposed location would violate zoning restrictions that required such uses to be at least 500 feet from churches and schools. Plaintiff sued for impairment of contract, a claim that required plaintiff to show a *change* in existing law. The court rejected plaintiff's claim not because the city council's denial was not legislative in nature, but because denying the transfer did not create a *change in law*. (*Id.* at 612-13, 615.)

Bryan v. City of Madison, 213 F.3d 267 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), and *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984), are all inapposite because they concerned *ministerial* land use decisions (*e.g.*, building permits), which have long been held to be administrative in nature.

Kamplain v. Curry County Bd. of Com'rs, 159 F.3d 1248 (10th Cir. 1998) simply held that banning someone from attending the commission's meetings or from speaking at such meetings was administrative in nature. (*Id.* at 1252.) The court's statement as to the nature of contract awards was simply a general expression of opinion that was unnecessary to the court's discussion, and is thus dictum. (*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 528, 162 Cal.Rptr. 327 (1980).) As it clearly conflicts with California law and the prevailing view on this subject (*see, e.g., Santa Ana Tustin Community Hospital v. Board of Supervisors*, *supra*, 127 Cal.App.3d at 652 ["award of a contract, and all of the acts leading up to the award, are legislative in character"]), it should be disregarded.

Nor is *Cinevision Corp. v. Burbank*, 745 F.2d 560 (9th Cir. 1984), helpful to Petitioners. There, a city

contracted with a promoter to provide entertainment for the city's amphitheater. The contract gave the city the right to cancel any show. The court held that in excluding specific performers, the city was administering the contract rather than acting legislatively. This was appropriate because the actions reviewed were *ad hoc* decision making: "The City Council voted on *each* proposed group and each vote necessarily affected a *specific* entertainer." (*Id.* at 579, n. 26, emphasis added.)

Here, the Board was not evaluating Petitioners' individual programming or voting on what specific shows would be allowed. Rather, the Board was deciding who would have access to public rights-of-way and control over the sole cable franchise in the south county area. As this decision implicated the rights of all County residents, the County acted legislatively.

V. CONCLUSION.

For all of the foregoing reasons, the County of Santa Cruz respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC,
AND PAUL G. ALLEN,
PETITIONERS,

v.

COUNTY OF SANTA CRUZ, CALIFORNIA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Far from providing a good reason for denying the petition for certiorari, the opposition brief filed by Respondent County of Santa Cruz, California (the "County") only serves to highlight the very reasons why review by this Court is necessary.

The County argues for an expansive role for local franchising authorities in regulating cable franchisees, in stark contrast with the more circumscribed role that Charter contends is mandated by national cable policy. Despite its best efforts, the County is unsuccessful in papering over the conflicts in the lower courts on this very issue. This Court should grant the writ to resolve this fundamental disagreement. The County also is unable to identify a clear waiver by Petitioners of their First Amendment rights, and the County's defense of an implicit waiver of First Amendment rights only underscores the flawed and problematic nature of the Ninth Circuit's decision. In addition, the County's reliance on California state law for its argument that it was engaged in "legislative acts" conflicts with the uniform national policy inherent in the Cable Act[1] and with the decisions of other circuits. As is apparent from its opposition brief, the County wants local governments to have far-reaching powers to evaluate corporate transactions in the cable industry and to extract unlawful concessions from cable systems without any meaningful review by the federal courts. The writ should be granted to review and reverse the dangerous precedent established by the court of appeals' decision.

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1 The "Cable Act" refers to the Cable Communications Policy Act of 1984 and subsequent amendments in 1992 and 1996. (Pet. at 1.)

A. The Substantial Deference Standard Adopted By The Ninth Circuit Conflicts With The Uniform National Policy Established By Congress

1. This case presents competing concepts of the role of local governments in the cable context. As Charter discussed in the petition (Pet. at 9), Congress intended the Cable Act to "establish a national policy concerning cable communications." 47 U.S.C. § 521(1). The role of local franchising authorities was restricted in this national scheme, thereby "minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems." *Id.* at § 521(6). The preeminence of national cable policy and the concomitant limitations on the regulatory actions of local governments has been recognized on numerous occasions by this Court and the lower courts. (Pet. at 9-10, 15-16.)

In arguing for broad deference to local franchising authorities, the County sets forth a very different view of the role of local governments under the Cable Act. (Br. in Opp. at 7-13.) According to the County, the goal of Congress in passing the Cable Act was simply to clarify the existing system of local, state, and federal regulation of cable television and not to restrict local authority. (*Id.* at 7.) The County apparently sees few, if any, limits on a local government's role in the approval of transfers or the franchising process in general.

This Court should grant the writ in this case to resolve this important issue concerning the deference due local governments in the cable context. Consistent with the Cable Act and the case law, *see, e.g.*, *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984); *City of New York v. FCC*, 486 U.S. 57 (1988), this Court should reject the standard of substantial deference to local governments promulgated by the Ninth

Circuit's opinion below as inconsistent with the national policy established by Congress.[2]

2. The County also presents a very different version of the facts. According to the County, it sought only *"requests for information"* and its "rate freeze and payment proposals were not *demands*." (Br. in Opp. at 1, 6 (italics in original).) The County further notes, in an argument placed in italics and boldface, that the actual language of the County Board of Supervisors' resolution did not include mention of the rate freeze or $500,000 payment. (*Id.* at 5.)

The factual contentions by the County were not accepted by the federal district court. Rather, after an eight-day trial, the district court found that

> [t]he denial was based upon plaintiffs' refusal to comply with the County's information requests, its demand for an independent financial study to be financed by Charter, its demand for cash payment of $500,000 and its demand for a further rate freeze.

(App. at 42a-43a.) The district court then examined each of these bases relied upon by the County, including its information requests, and concluded that each of the County's

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[2] The significance of this key issue about the deference due local franchising authorities is reflected by the amicus brief in support of the petition filed by the National Cable & Telecommunications Association, the American Cable Association, and the California Cable and Telecommunications Association, as well as the amicus briefs filed in the court below by the National League of Cities and a host of local governments.

grounds violated the Cable Act. (App. at 44a-71a; *see also* Pet. at 11-15.)[3]

The discrepancy between the County's factual recitation and the findings and conclusions of the district court lies at the heart of the problem with the Ninth Circuit's deferential standard. The court of appeals considered the County's pretextual justifications on their face. Based on its extreme deference, the Ninth Circuit refused to scrutinize the County's actions in any meaningful way, "see[ing] no reason for either the district court or this panel to reach the issues regarding the Cable Act." (App. at 3a n.3.) Yet, this approach eliminates any effective judicial review. The result is an invitation to the numerous local franchising authorities to use pretextual rationales to extract unlawful concessions in return for consents to transfer, contrary to the Cable Act and FCC regulations.

3. The County also argues that there is no confusion in the case law regarding the application of deference in the cable context, positing a supposed distinction between "issues of preemption or statutory interpretation" and those involving "discretionary actions." (Br. in Opp. at 10,

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[3] As the FCC has clearly stated,

> in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters.

In re Matter of Implementation of Sections 11 & 13 of the Cable Television Consumer Protection Act of 1992, 8 F.C.C.R. 682, ¶ 39 n.38 (1993) (hereinafter "1993 Order"). Here, the district court held that the County "tried to do exactly what Footnote 38 and federal law prohibited." (App. at 71a.)

14-15.)[4] The County, however, cites to no cases explaining or discussing the rationale for this so-called distinction.[5] The County created this theory of "preemption and statutory" versus "discretionary" out of whole cloth. The County never describes what constitutes a "discretionary act" rather than a "statutory provision," given that in this case the County acted through a formal resolution of its Board of Supervisors. The County's argument also would turn the concept of deference on its head. The County would have a municipality receive *less* deference when it engages in public policymaking in passing official legislation and *more* deference when it is undertaking informal (and amorphous) "discretionary actions."

The distinction the County makes between "statutory provisions" and "discretionary actions" also underscores the internal inconsistency of the County's position. The County argues that it is entitled to broad deference because its denial of consent to Charter's transfer was a "discretionary action" and not "a statutory provision." (Br. in Opp. at 15.) Yet, later in its opposition (*id.* at 19-25), the County asserts that it is entitled to deference because it was acting "legislatively." These two positions cannot be reconciled.

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4 "Because the courts there were reviewing discretionary actions, rather than statutory provisions, the franchising authorities' decisions were entitled to deference." (Br. in Opp. at 15.)

5 In fact, *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356 (4th Cir.2001); *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000); *Cable Alabama Corp. v. City of Huntsville*, 768 F. Supp. 1484 (N.D. Ala. 1991), all arise from the same transfer context as this case. In each instance, the local government argued for deference, yet the courts engaged in the analysis of federal cable law the Ninth Circuit assiduously avoided here.

The case law does not recognize the distinctions imagined by the County. Rather, in numerous cases, including those addressing transfers of control and other comparable circumstances, courts have applied the Cable Act without any of the special deference to the local franchising authority accorded by the Ninth Circuit here. This Court should grant the petition to address these conflicting decisions on an important issue of national cable policy.

B. The Court of Appeals' First Amendment Analysis Is Flawed And Threatens The Rights Of All Cable Franchisees

1. The County defends the Ninth Circuit's denial of Charter's First Amendment challenge by first arguing that the Ninth Circuit "applied" *United States v. O'Brien*, 391 U.S. 367 (1968), and concluded that the County "passed" *O'Brien*'s First Amendment test. (Br. in Opp. at 15-16.) Yet, nowhere in the opinion does the court of appeals cite to or mention *O'Brien*. Nor does the Ninth Circuit ever attempt to evaluate whether the County's actions placed an "incidental burden" on the First Amendment rights of Petitioners that was "no greater than is essential" to the furtherance of the County's interest, as required under *O'Brien*. *See* 391 U.S. at 377. The County's assertion that the Ninth Circuit applied *O'Brien* is, quite simply, disingenuous.[6]

2. Not surprisingly, the County's brief does not identify any clear statement in the franchise agreement

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[6] In addition, the County maintains that *O'Brien* is satisfied since the court of appeals refers to a "legitimate governmental interest." (Br. in Opp. at 16.) Yet, this is not the equivalent of the "*important* or *substantial* governmental interest" required by *O'Brien*. 391 U.S. at 377 (emphasis added). Also, as noted above, there is no analysis of whether the restriction on First Amendment freedoms is "no greater than is essential."

whereby Charter waived its First Amendment right to challenge the County's actions. As the County well knows, no such waiver ever took place. The County, instead, appears to argue that a waiver can be implied from the agreement because Charter was a "sophisticated party." (Br. in Opp. at 18.) This type of implicit waiver is not permitted under this Court's First Amendment jurisprudence, which requires intelligent, knowing and clear waivers of fundamental rights.[7] (Pet. at 18-20.) In particular, no waiver of First Amendment rights can be found against Petitioner Paul Allen, who was not a party to the original franchising agreement between Charter and the County.

C. The County's Denial Of Consent To Transfer Was Not A "Legislative Act" When It Acted Pursuant To Its Contractual Obligations

1. In arguing that its denial of consent constituted a "legislative act" due substantial deference, the County relies on a welter of California state court decisions. (Br. in Opp. at 19-25.) The County apparently maintains that California law allows municipalities broad deference and therefore condones the County's flouting of its contractual obligations. Yet, surely local or state law does not control the amount of deference due the acts of the local government under the Cable Act. Where, as here, the cable operator challenges the actions of the local franchising authority on the grounds that it violates the Cable Act and First Amendment, the standard of deference cannot be dependent on the local law -- a contrary

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[7] The court of appeals' conclusion that franchise agreements constitute waivers is especially troubling in light of the unequal power relationships, with local governments having disproportionate leverage as a result of their monopoly on cable access.

result would devastate the uniform national policy established by Congress.

2. The County attempts to blur the different circumstances of transfers with those of grants and renewals of franchises. (Br. in Opp. at 19-21.) The County entered into a contract with Charter that addressed the issue of consent to transfer. The County obligated itself to abide by certain terms in connection with any such transfer by Charter. These contractual obligations make the County's actions relating to transfers markedly different than the granting or renewal of franchises where the County acts without any such contractual commitments. In light of the binding contractual provisions, transfers involve the County acting in its administrative or executive capacity, rather than engaging in unfettered legislative policymaking. (Pet. at 22-27.)

3. The County's large collection of California state cases also does not change the fact that the Ninth Circuit's decision conflicts with numerous decisions in other circuits. (Pet. at 24-27.) This Court should grant this petition to resolve the conflict among the appeals courts and reverse the Ninth Circuit.

D. The Issues In This Petition Are Important For The Cable Industry And Others

1. The real agenda of the local franchising authorities is betrayed in footnote 9 of the County's brief. In that footnote, the County questions the financial underpinnings of not just the Charter/Paul Allen transaction but also the AT&T/TCI merger. (Br. in Opp. at 13 n.9.) As that footnote implicitly acknowledges, each of the thousands of local franchising authorities would like broad authority to conduct wide-ranging examinations and negotiations relating to any and all cable system transactions. Ignoring the limitations inherent in the 120-day rule and the FCC's 1993

Order (*see* Pet. at 11-12), each local franchising authority wants to engage in extensive investigations of the detailed financial terms of the AT&T/TCI merger and other major transactions. The obvious result of such a regime would be to threaten the viability of future transactions in the cable industry, hindering the industry consolidation and flow of capital needed to keep pace with technology.

2. More ominously, the deferential standard adopted by the Ninth Circuit allows local governments to extract unlawful concessions from cable systems with impunity. By turning a blind eye to the reality of the situation, and by scolding the district court for going beyond a superficial review, the court of appeals is virtually encouraging local franchising authorities to use pretextual "problems" to obtain *quid pro quos* not permitted by the Cable Act and the FCC regulations. This Court should grant the petition because of the potential impact of this case on the cable industry and other government contractors.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

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No. 02-1267

IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC,
AND PAUL G. ALLEN,

Petitioners,

v.

COUNTY OF SANTA CRUZ, CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TELEVISON AND CABLE FACTBOOK, Cable Vol. 2 (2003) 4,5

REPLY BRIEF FOR THE PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, petitioners submit this brief in response to the Brief for the United States and the Federal Communications Commission as Amicus Curiae, filed November 19, 2003.

Thé Solicitor General agrees with petitioners that the court of appeals' decision was wrongly decided. The Solicitor General concurs that the Ninth Circuit erred in failing to protect adequately the federal interest in uniform national standards for cable franchising. The Solicitor General also considers this to be an important issue, on which this Court may wish to grant review. Nevertheless, the Solicitor General suggests that the court may wish to wait for further development of the law in this area. This suggestion to postpone review is unrealistic, and both fails to recognize the substantial real world economic costs that will be incurred in the interim and fails to take into account the significant practical obstacles to the development of future cases involving denials of transfers.

1. The Solicitor General agrees with petitioners on virtually all of the key substantive aspects of this case:

- The Solicitor General agrees that the Cable Communications Policy Act of 1984 (1984 Cable Act)[1] was designed to provide uniform national standards for cable franchising and, in particular, "to provide stability and certainty to the process of granting and renewing cable franchises," *1984 House Report* 22. (U.S. Br. 2.)

- The Solicitor General agrees that, in promulgating rules implementing the Cable Act, the Federal Communications Commission expressly cautioned that "in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent

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[1] Pub. L. No. 98-549, 98 Stat. 2779 (42 U.S.C. 521 *et seq.*).

the Commission's authority over rate regulation, franchise fees, or other matters. For example, a franchising authority may not delay a transfer or impose conditions on a transfer authorization that would impinge upon the Commission's statutory authority."[2] (U.S. Br. 4-5.)

- The Solicitor General agrees that the undisturbed district court findings are that the County of Santa Cruz acted for "multiple reasons that were impermissible under federal law" in denying Charter's application to transfer its cable franchise. (U.S. Br. 13-14.)

- The Solicitor General agrees that "the court of appeals erred in permitting the County to act for reasons that violate federal law." (U.S. Br. 15.)

- The Solicitor General agrees that the decision of the court of appeals "fails to provide adequate protection to federal law and federal interests in this [cable] area." (U.S. Br. 15.) As the Solicitor General notes, "[t]he Ninth Circuit's decision upholding the County's denial of the transfer application invites circumvention of federal law by local franchising authorities and would fail to vindicate important federal rights." (U.S. Br. 16.)

- The Solicitor General agrees that allowing local governments to use the transfer process to extract unlawful *qui pro quos* from franchisees is a "disturbing prospect" that "threatens the achievement of the Cable Act's purposes to 'establish a national policy concerning cable communications,' 47 U.S.C. 521(1), and to 'promote competition in cable communications

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[2] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 F.C.C.R. 6828, 6834 n.38 (1993).

> and minimize unnecessary regulation that would impose an undue economic burden on cable systems,' 47 U.S.C. 521(6)." (U.S. Br. 18.)

Not surprisingly, therefore, the Solicitor General agrees that "[t]his Court accordingly may wish to grant certiorari in this case." (U.S. Br. 2, 18.)[3]

2. The Solicitor General, however, goes on to suggest that the Court "may benefit from postponing review" until other courts of appeals have addressed this issue. (U.S. Br. 19-20.) This recommendation ignores the significant, real-world consequences of such a delay.

Allowing the Ninth Circuit decision to stand will have a serious impact on transactions and franchise renewals in the cable industry. In the wake of the Ninth Circuit decision, local franchising authorities are being *encouraged* to make unlawful demands on cable operators (and ultimately, their customers), even with extortionate motives. They are being encouraged because of the expectation that by including one arguably legitimate rationale with their demands, they can pass judicial scrutiny based on the court of appeals' decision. In addition, they are aware that the Ninth Circuit's lax standard allows them to impose such significant delays on cable transactions that cable operators are likely to accede to all demands in order to avoid time consuming and uncertain litigation that could imperil significant transactions for financing and sale. The Solicitor General's recommendation, therefore, would ignore the substantial costs of postponing review for a day that may never come or only after there has been a

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[3] The Solicitor General urges that review be granted on a different question than petitioners presented. Petitioners agree that the issue concerning "mixed motive" decisions identified by the Solicitor General is an important one, and would urge that the writ be granted on this question alone or in addition to one or more of the questions posed by petitioners.

significant and damaging financial impact on the cable industry and cable subscribers.

The lower court's erroneous decision, if permitted to stand, will be the governing law for the almost one thousand cable systems serving 11 million subscribers in California and the other states within the Ninth Circuit. *See* TELEVISON AND CABLE FACTBOOK, Cable Vol. 2 (2003). This Court has previously commented on California's importance as "one of the largest, most populated . . . States in the Nation." *Saenz v. Roe*, 526 U.S. 489, 492 (1999), and recognized this as the basis for granting review of programs that are exclusive to California. *See id.; Hillside Dairy, Inc. v. Lyons*, 123 S. Ct. 2142 (2003) (California milk pricing and pooling laws). Here, the court of appeals decision invites these local franchising authorities in California and eight other Western states to use "plausible" pretexts to extract impermissible concessions in violation of federal law.

Yet, the economic costs of the Ninth Circuit's decision will not be limited to California or the Ninth Circuit. Rather, transactions such as Paul Allen's purchase of Charter Communications, or the merger of AT&T and TCI, or the recent merger of Comcast and AT&T, are national deals. Even if limited to the local franchising authorities within the Ninth Circuit, these national transactions will be chilled or, at a minimum, incur substantial additional costs if companies are required to satisfy local franchising authorities' unlawful demands in order to receive consent to the transfers.[4] Moreover, many other local franchising

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[4] Adelphia, Charter, Comcast, Cox, and Time Warner all have numerous cable systems within the Ninth Circuit. *See* TELEVISION AND CABLE FACTBOOK, Cable Vol. 2 (2003). Thus, the County of Santa Cruz, this time joined by the City of Santa Cruz, used their new-found powers under the decision to try and hold up the Comcast/AT&T merger. http://www.multichannel.com/article/CA261337. In addition, because franchise "transfers" that local franchising authorities may review often include simple refinancings or changes in control within

authorities and their consultants in states outside of the Ninth Circuit have watched developments in this case and will use it as a basis for making unlawful demands in the franchise renewal and transfer process. The cumulative cost and burden resulting from these improper demands for concessions will create a marked barrier to transfers, threatening the industry consolidation and flow of capital needed to keep pace with technology and deliver to consumers new programming, information, and broadband services.[5] The cable industry and American consumer should not have to incur the serious adverse consequences of the delay suggested by the Solicitor General.[6]

In addition, the Solicitor General does not fully recognize the practical hurdles cable operators must overcome in order to ever reach this Court. If the Ninth Circuit's decision stands, abuse of the transfer process will continue without being litigated, because the practical reality is that national cable transactions are multi-billion

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Footnote continued from previous page

an existing corporate framework, routine business operations of the cable systems in the Ninth Circuit can be similarly held up.

[5] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations*, 15 F.C.C.R. 9816 (2000).

[6] As the amici curiae National Cable & Telecommunications Association, California Cable & Telecommunications Association, and American Cable Association stated in their brief in support of petitioners:

> The practical consequence of [the court of appeals] decision is considerable. . . [T]he impact of the decision will extend well beyond the Ninth Circuit. . . If some of the systems being transferred are in the Ninth Circuit, and, as a result of the decision below, those systems will be effectively forced to relinquish statutory and First Amendment rights in the transfer approval process, many of those transactions will be discouraged. Insofar as such transactions improve efficiency, cable subscribers across the country will be worse off. [ ] Thus, the case presents questions of broad national significance. (Amici Br. 15.)

dollar deals that cable companies are unwilling to jeopardize. Many transactions are on tight time frames or must close before a year's end for tax reasons. Any delay by a local franchising authority would put those transactions at risk.[7] As a result, the safer course typically is to acquiesce to the demands for cash payments or other unlawful concessions by individual local franchising authorities. The reality is that only in rare circumstances will there be an opportunity for a test case to develop and work its way through the court system. In the meantime, the very things that the Solicitor General recognized as "disturbing prospect[s]" and distinct "threats" will, in fact, occur, such as the invitation to local franchising authorities to circumvent federal law (U.S. Br. 16), the franchising authorities' accomplishment of "forbidden ends" by conditioning approval of transfers on illegal cash payments or other concessions (U.S. Br. 17), and the chilling effect on national cable transactions.

Finally, the Solicitor General's assumption that the Court has the need for the development of the law by other circuits is contradicted by his own brief. As he notes, the federal courts, including this Court, have addressed the problem of "mixed motive" decisions on numerous occasions in other contexts.[8] (U.S. Br. 17-18.) There is no

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[7] For example, in 2002, the City of Thousand Oaks convinced a district judge to enter a preliminary injunction barring the transfer of the cable system. It took over a year for the Ninth Circuit to reverse the decision as an abuse of discretion. It reversed on technical grounds that the local franchising authority had waived a key argument, and over a dissent that the local franchising authority was within its discretion under *Santa Cruz*. *City of Thousand Oaks v. Verizon*, 2002 WL 987910 (C.D. Cal. 2002), *rev'd*, 69 Fed.Appx. 826 (9th Cir. 2003). Such delay and uncertainty can seriously affect major national cable transactions, refinancings and equity transfers. In these circumstances, the economic pressure to accede to unlawful demands is overwhelming.

[8] The decisions of the other courts of appeals are in direct conflict.

Footnote continued

reason to believe that the cable context should be different, and the Solicitor General does not suggest otherwise. *Id.* (listing Title VII, Labor, First Amendment and other cases addressing "mixed motives" and stating that "A similar standard, rather than the court of appeals' 'any permissible factor' standard, would be appropriate here.").[9]

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with the Ninth Circuit's ruling below. Other circuits in a variety of contexts have followed the "motivating factor" analysis, whereby "a challenged action based on both permissible and impermissible motives violates the federal prohibition unless the same action would have been taken in the absence of impermissible motives," (U.S. Br. at 17-18 (citing *Desert Palace, Inc. v. Costa*, 123 S.Ct 2148, 2150 (2003)). *See Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 192-93 (4th Cir. 2003); *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1998); *Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 170 (1st Cir. 1995); *N. Miss. Communications, Inc. v. Jones*, 951 F.2d 652, 654 (5th Cir. 1992); *Office & Prof'l Employees Int'l Union v. NLRB*, 981 F.2d 76, 85 (2d Cir. 1992); *O'Brien v. Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989). The Ninth Circuit, however, applied an "any permissible factor" standard in this case. Because the Ninth Circuit's new "any permissible factor" standard cannot be squared with the case law in the majority of its sister circuits nor, indeed, with this Court's teachings on this topic, the Court should grant review to address this significant circuit conflict and departure from Supreme Court jurisprudence.

[9] The lower court's erroneous decision also has implications beyond the cable industry. To the extent that it is applied by federal courts in other contexts, the Ninth Circuit opinion will lead to incorrect outcomes whereby actions in violation of federal law are justified -- whether based on the appeals court's flawed treatment of mixed motives or its excessive deference to local government. *See, e.g., Center for Fair Public Policy v. City of Phoenix, State of Arizona, et al.*, 336 F.3d 1153, 1168-69 (9th Cir. 2003) (citing Ninth Circuit's decision below for the proposition that courts should grant deference to state government in First Amendment context).

CONCLUSION

For the reasons stated above, as well as those previously stated in the petition, reply brief and amicus brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioners,

v.

COUNTY OF SANTA CRUZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Pursuant to Rule 15.8 of the Rules of this Court, Respondent County of Santa Cruz ("County") submits this Brief in response to the Brief for the United States and the Federal Communications Commission as Amici Curiae, filed November 19, 2003.

The County heartily concurs with the Solicitor General's conclusion that "[t]he petition for writ of certiorari should be denied." (U.S. Br. 20.) As the Solicitor General concedes, in its present posture this case involves a state-law breach-of-contract dispute, rather than a review-worthy Constitutional claim. (U.S. Br. 19, n. 5; *id.* at 4 ["In our view, the First Amendment question presented in the petition does not warrant this Court's review"].) It would be improvident to grant review of a state-law breach-of-contract action bereft of Constitutional issues.[1]

The Solicitor General, however, also opines that this Court's review would not be inappropriate because the court of appeals applied a standard of review that was arguably too deferential, under which the County's action would be upheld as long as there was substantial evidence for any one sufficient reason for denial. (Pet. App. 7a.) The Solicitor General suggests that the

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[1] Nor does this case involve a claim brought directly under the Cable Act (47 U.S.C. §§ 521 *et seq.*) or a claim under the Supremacy Clause that the County's action was preempted by the terms of the Cable Act. Although Petitioners originally claimed that the County's denial of consent violated various provisions of the Cable Act, that claim was dismissed on the ground that Petitioners had no private right of action under the Act. (*Charter Communications, Inc. v. County of Santa Cruz*, 74 F.Supp.2d 937, 939 (N.D. Cal. 1999.) Petitioners chose *not* to appeal that determination. Because the Cable Act does not provide for a private right of action, Petitioners could not sue under 42 U.S.C. § 1983 for a violation of the Act, and thus no federal question is presented upon which to base federal jurisdiction.

appropriate standard of review might be a *mixed motives standard*, under which the validity of the Board of Supervisors' action would depend upon "the motivating factor" behind the Board's action as determined by a court. According to the Solicitor General, apparently it was appropriate for the district court, in order to protect the federal interests expressed in the Cable Act, to eschew the reasons for denial set forth in the Boards' Denial Resolution and to determine for itself the "real" motives behind the Board's action. Short of this, the Solicitor General warns, local franchising authorities could accomplish forbidden ends, such as imposing local technical standards, regulating rates, or requiring illegal payments to the agency because "so long as the authority identifies one plausible alternative basis for its action, that action would be upheld." (U.S. Br. 16-17.)[2]

The Solicitor General's position is without merit for several reasons. First, as conceded by Petitioners, the issue of a mixed motives standard of review was not

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[2] The Board of Supervisors' Denial Resolution sets forth a plethora of reasons why the Board denied its consent to the proposed transfer, and expert testimony established that the Board's concerns all reasonably related to Petitioners' failure to adequately establish the financial, technical, and legal qualifications of the transferee. None of the stated reasons for denial were based on Petitioners' purported refusal to agree to extend a rate freeze, to pay illegal franchise fees, or to otherwise agree to conditions illegal under the Act. Although the Solicitor General repeatedly states that the court of appeals left most of the findings of the district court unreversed (U.S. Br. 1, 12, 14, 17), the court of appeals expressly reversed and vacated the district court's judgment and decision herein, thus depriving them of all conclusive effect. (*Franklin Savings Assn. v. Office of Thrift Supervision*, 35 F.3d 1466, 1469 (10th Cir. 1994).)

raised or addressed in the district court or in the court of appeals, and was not even raised in the petition for writ of certiorari. (Pets. Supp. Br. 3, n. 3.) Thus, the Court should not consider the issue here. (Supreme Court Rules 14.1(a) ["Only the questions set out in the petition, or fairly included therein, will be considered by the Court"]; *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) [the Court has, with very rare exceptions, refused to consider a petitioner's claims not raised or addressed below].)

Second, transfer applicants would not be forced to accede to conditions that are proscribed by the Act under the deferential standard of review applied by the court of appeals. Any illegal conditions imposed on a transfer application would be subject to either a refund action or to invalidation by way of a writ of mandate or declaratory relief action. Contractual agreement does not protect otherwise unlawful conditions. (*See, e.g.*, *Williams Communications, LLC v. City of Riverside* (No. E032661, Dec. 18, 2003) __ Cal.App.4th __ (2003 DJDAR 13841) [city ordered to refund payment illegally imposed under license agreement on interchange carrier as a condition of carrier's installing fiber optic cable in city's streets].)

Third, case law does not support the Solicitor General's position. The cases cited by the Solicitor General wherein a mixed motives, two-step burden-shifting analysis was utilized were either (i) invidious discrimination/First Amendment retaliation cases *where motive was relevant under the Constitutional standard*, or (ii) cases based on alleged violations of federal statutes *that expressly provided for a mixed motives standard of review* (Title VII or the National Labor Relations Act).

Thus, in *Desert Palace, Inc. v. Costa*, 123 S.Ct.

2148 (2003) plaintiff sued her employer alleging sex discrimination under Title VII. Under Title VII, an unlawful employment practice is established when plaintiff demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors may also have motivated the practice. (42 U.S.C. § 2000e-2.) Under the express terms of the statute, however, if defendant shows it would have taken the same action in the absence of the impermissible motivating factor, a court may grant only injunctive or declaratory relief and attorneys' fees—it may not award damages, reinstatement, or promotion. (*Id.* § 2000e-5(g)(2)(B).) Thus, Title VII specifically directs courts to investigate the motives of an employer in determining whether an unlawful employment practice exists and to undertake a mixed motives, burden-shifting analysis to determine whether the employer has a partial affirmative defense to such a claim. Significantly, no similar Congressional direction or authorization exists in the Cable Act.[3]

Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) is inapposite because it concerned a claim of First Amendment retaliation which, in essence, is a content-based claim subject to heightened scrutiny.

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[3] The Cable Act provides no substantive limitations on local franchising authorities in their review of *transfer* requests and establishes no specific judicial standard for their review. The only substantive limitations imposed by the Cable Act concern franchise *renewals*, and the only standard of judicial review prescribed by the Act is a "preponderance of the evidence" standard in connection with such *renewals*. (47 U.S.C. § 546(e).) Congress could have easily provided for substantive limitations with regard to transfers and a mixed motives standard for their review had it so desired. Absent some Congressional indication to the contrary, the courts should decline to formulate a heightened standard of review in the name of protecting federal interests.

Thus, governmental motivation was directly relevant to the Constitutional standard and a burden-shifting analysis was again appropriate. Here, Petitioners have conceded that the County's actions were content-neutral, and retaliation was not alleged.

Similarly, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) involved claims of racial discrimination under the Equal Protection clause of the Fourteenth Amendment. The Court held that plaintiffs needed to show racially discriminatory intent rather than simply disproportionate impact to establish their claim. Again, motive and burden-shifting were directly relevant to this Constitutional standard. Neither racial discrimination nor any other invidious discrimination was alleged by Petitioners here.

Finally, *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) simply upheld an NLRB rule construing a statutory provision under the National Labor Relations Act allocating the burden of proof with regard to an employer's affirmative defense to a claim of unlawful discharge because of union activity. Thus, the case involved an administrative (not legislative) decision in which employer motives and burden-shifting were specifically made relevant under the terms of the statute. The Cable Act contains no similar provisions, and thus the case is inapposite.[4]

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[4] Similarly, the cases cited in Petitioners' Supplemental Brief which applied a mixed motives analysis (Pets. Supp. Br. 7, n. 8) are inapposite because they involve either (i) First Amendment *retaliation* (*North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652 (5th Cir. 1992); *Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165 (1st Cir. 1995); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115 (8th Cir. 1989)); (ii) violations of the *National Labor Relations Act* (*Laro Maint. Corp. v. NLRB*, 56 F.3d 224 (D.C. Cir. 1998); *Office & Prof'l*

In all of the cases cited by the Solicitor General, motive was relevant under either the Constitutional or the statutory standard. Not so here. Petitioners did not allege retaliation because of First Amendment activity or discrimination based on a suspect classification. Rather, Petitioners simply alleged that the County breached a contract under California law by acting unreasonably in denying its consent to the transfer of the franchise. Because this case simply involves the review of a legislative act in a breach of contract context, this Court's precedents prohibit peering into legislative motivation or applying a burden-shifting analysis, as suggested by the Solicitor General. (*See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44, 55-56 (1998) [whether act is legislative turns on nature of the act, not on the motive of the officials performing it; city's action bore all the hallmarks of traditional legislation because it "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents"]; *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-315 (1993) [rational basis review applies to legislative acts and actual motivation for challenged action is irrelevant]; *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968).)

Finally, in arguing that a heightened standard of review of a local agency's franchising decisions is necessary to protect "federal rights," the Solicitor General paints with too broad a brush, simply assuming that the Cable Act concerns only *federal* interests. The

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Employees Int'l Union v. NLRB, 981 F.2d 76 (2d Cir. 1992)); or (iii) claims under *Title VII* (*Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187 (4th Cir. 2003). As stated, the case at bar involves none of these issues.

Solicitor General ignores the fact that the Cable Act establishes a "deliberately structured dualism" under which Congress preempted local control only in certain aspects of cable regulation (*e.g.*, technical standards and rate regulation), while leaving the *franchising* process largely to local authorities. Thus, according deference to local franchising decisions does *not* jeopardize federal interests. Rather, it promotes the Act's expressed intention that local franchising decisions be made at the local level where city officials have the best understanding of local needs and are most familiar with individual operators and franchise agreements, and thus better positioned to evaluate the effects of a proposed transfer on the community.

Furthermore, case law concerning the analogous Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("the TCA") disposes of any argument that the presence of federal interests justifies a heightened standard of review. Reflecting the dualism of the Cable Act, the TCA also constitutes "a deliberate compromise between *two competing aims*—to facilitate *nationally* the growth of wireless telephone service and to maintain substantial *local control* over siting of towers." (*Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 407 (3rd Cir. 1999), emphasis added.) Thus, the TCA also involves important federal rights and interests. However, unlike the Cable Act, the TCA also provides for a private cause of action to enforce the limitations on local control (47 U.S.C. § 332(c)(7)(B)(v)), and specifically provides that a local agency's denial of a request to construct a wireless service facility must be supported by "substantial evidence in a written record." (*Id.* § 332(c)(7)(B)(iii).)

In applying this judicial standard, courts have accorded local agency decisions the same deference that

the court of appeals accorded the County's decision in the case at bar. For example, in *Sprint Spectrum v. Charter Township of West Bloomfield*, 141 F.Supp.2d 795 (E.D. Mich. 2001), plaintiff alleged that the township violated the TCA when it denied Sprint's application for a special use permit to build a communication tower. The township gave four reasons for disapproving the application. (*Id.* at 796-797.) Quoting the Sixth Circuit, the court stated that *substantial deference* must be accorded the local agency's decision and that the court's job was merely to determine whether substantial evidence supported *any* of the stated reasons:

> The substantial-evidence standard allows considerable latitude to administrative decisionmakers. It presupposes that there is a zone of choice within which the decisionmakers can go either way, without interference by the courts. An administrative decision is not subject to reversal merely because substantial evidence would have supported an opposite decision.

(*Id.* at 799, quoting *Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986).) Applying this test, the court determined that substantial evidence supported the township's first stated ground for denial (that the tower was inappropriate for the proposed location), which was enough to uphold the township's decision:

> As the Court is satisfied that the Township's first reason for denying Sprint's application was supported by substantial evidence, the Court will not discuss the Township's additional reasons for denying the permit.

(*Id.* at 802; *accord, USCOC of Virginia R.S.A. #3, Inc. v. Montgomery County*, 343 F.3d 262, 271 (4th Cir. 2003) [in upholding county's denial of application for wireless tower, the court stated: "The Supreme Court has defined 'substantial evidence' to mean 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . It includes more than a mere scintilla but less than a preponderance. . . . [W]e do not substitute our judgment for the legislature's but must uphold the decision if it has 'substantial support in the record as a whole'"].)

Moreover, like the Cable Act, which preempts certain local control of cable television, the TCA preempts certain local control in order to facilitate the national growth of the telecommunications industry. For example, local entities are prohibited from relying on concerns about radio frequency emissions to support a denial of an application to place wireless facilities so long as the emissions comply with applicable FCC regulations. (47 U.S.C. § 332(c)(7)(B)(IV).) The courts, however, have *not* held that the presence of such federal interests transforms the appropriate standard of review from the deferential substantial evidence test to a mixed motives analysis. Rather, the courts have merely held that concerns of health risks due to emissions may not constitute substantial evidence in support of a denial. (*Telespectrum, Inc. v. Public Service Comm. of Kentucky*, 227 F.3d 414, 423-424 (6th Cir. 2000).) Even when such concerns have been inappropriately included in a decision to deny an application, such inclusion was not fatal where other legitimate grounds for denial were present in the record. (*Cellular Telephone Co. v. Zoning Board*, 90 F.Supp.2d 557, 572-573 (D.N.J. 2000); *Iowa Wireless Servs. L.P. v. City of Moline*, 29 F.Supp.2d 915, 924

(C.D. Ill. 1998).)

Consequently, there is no authority for transforming the substantial evidence test or rational relationship test into a mixed motives analysis simply because federal interests may be involved in the legislative decision of a local entity. The extension of a mixed motives analysis to state contract claims which implicate federal statutory interests would constitute a frontal assault on established principles of federal-state comity and the separation of powers.

CONCLUSION

As recommended by the Solicitor General and the Federal Communications Commission, the petition for writ of certiorari should be denied. Moreover, the suggestion that the Court may wish to reframe the issues and grant the petition should be rejected for the several reasons stated herein.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC.,
AND PAUL G. ALLEN,

PETITIONERS,

v.

COUNTY OF SANTA CRUZ CALIFORNIA,

RESPONDENT.

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Motion of National Cable & Telecommunications Association, California Cable & Telecommunications Association, and American Cable Association For Leave to File Brief As *Amici Curiae* and Brief In Support of Petitioners

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 37(b) of the Court's Rules, the National Cable & Telecommunications Association ("NCTA"), the California Cable & Telecommunications Association ("CCTA"), and the American Cable Association ("ACA") request leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari in this case. The petitioners have consented to the filing of the brief, but the respondent County of Santa Cruz has refused to consent.

The National Cable & Telecommunications Association ("NCTA") is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks. NCTA's members also include suppliers of equipment and services to the cable industry.

The California Cable & Telecommunications Association ("CCTA") represents the cable television industry in the State of California. The American Cable Association ("ACA") is a national trade association whose interests focus on smaller cable operators. ACA's members serve customers primarily in small communities and rural areas across the United States.

The decision of the Ninth Circuit, if left in place, will affect cable operators (and their customers) throughout the nation. Most of the more than 11,000 franchise agreements that exist between cable operators and local governments include provisions requiring the operator to obtain the local government's consent to a transfer of ownership of a franchised cable system. The deferential standard adopted by the Ninth Circuit will allow and encourage local franchising authorities to use the transfer process to insist on fees and concessions from cable operators that are barred by Title VI of the Communications Act of 1934, as amended, 47 U.S.C. §§ 521, *et seq.*, and by the First Amendment.

As a result of trends toward consolidation and regional clustering of cable systems, transfers of ownership of cable companies and individual cable systems often occur. The temptation for local franchising authorities to ask for monetary and regulatory concessions in return for their approval is substantial. But excessive fees and regulatory obligations increase the cost of cable service, inhibit the ability of cable systems to develop and provide services in the manner that best meets consumer demand, and unfairly hamper the ability of cable operators to compete with direct broadcast satellite providers and other competitors. These are major reasons why Congress adopted the provisions of Title VI in the first place, and why such requirements directly affect First Amendment rights.

NCTA, CCTA and ACA, on behalf of their members, have an interest in ensuring that the protections of Title VI and the First Amendment remain fully enforceable and that local franchising authorities not be encouraged and enabled by the Ninth Circuit's decision to ignore those protections with impunity. For these reasons, NCTA, CCTA and ACA respectfully request that their motion for leave to file an *amici curiae* brief be granted.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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INTEREST OF *AMICI*

The National Cable & Telecommunications Association ("NCTA") is the principal trade association representing the cable television industry in the United States.[1] Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks. NCTA's members also include suppliers of equipment and services to the cable industry.

The California Cable & Telecommunications Association ("CCTA") represents the cable television industry in the State of California. The American Cable Association

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of the brief.

("ACA") is a national trade association whose interests focus on smaller cable operators. ACA's members serve customers primarily in small communities and rural areas across the United States.

The decision of the Ninth Circuit, if left in place, will affect cable operators (and their customers) throughout the nation. Most of the more than 11,000 franchise agreements that exist between cable operators and local governments include provisions requiring the operator to obtain the local government's consent to a transfer of ownership of a franchised cable system. The deferential standard adopted by the Ninth Circuit will allow and encourage local franchising authorities to use the transfer process to exist on fees and concessions from cable operators that are barred by Title VI of the Communications Act of 1934, as amended, 47 U.S.C. §§ 521, *et seq.*, and by the First Amendment.

As a result of trends toward consolidation and regional clustering of cable systems, transfers of ownership of cable companies and individual cable systems often occur. The temptation for local franchising authorities to ask for monetary and regulatory concessions in return for their approval is substantial. But excessive fees and regulatory obligations increase the cost of cable service, inhibit the ability of cable systems to develop and provide services in the manner that best meets consumer demand, and unfairly hamper the ability of cable operators to compete with direct broadcast satellite providers and other competitors. These are major reasons why Congress adopted the provisions of Title VI in the first place, and why such requirements directly affect First Amendment rights.

NCTA, CCTA and ACA, on behalf of their members, have an interest in ensuring that the protections of Title VI and the First Amendment remain fully enforceable and that local franchising authorities not be encouraged and enabled by the Ninth Circuit's decision to ignore those protections with impunity.

SUMMARY OF ARGUMENT

Congress has comprehensively defined and limited the permissible roles of state and local governments and the Federal Communications Commission in regulating cable systems and cable operators. And, as this Court has made clear, the regulation of cable systems is also constrained by the First Amendment. But under the Ninth Circuit's decision in this case, all those statutory and Constitutional constraints on local governments disappear when a cable operator seeks to transfer a cable system. This Court should grant the petition for certiorari in order to make clear to the more than 11,000 franchising authorities in the nation that this is not the case.

The decision effectively gives local franchising authorities carte blanche to insist, in return for consenting to a transfer of ownership, on cash contributions and other requirements expressly forbidden under Title VI of the Communications Act of 1934, as amended, 47 U.S.C. §§ 521, *et seq.*, ("Communications Act") or by the First Amendment. This is because, instead of requiring *heightened* scrutiny to determine whether the local government's real reason for denying a transfer was valid and legitimate, the Ninth Circuit held that courts must give overwhelming *deference* to the local government's "legislative" determinations.

The district court determined that the County of Santa Cruz had unreasonably and unlawfully conditioned approval of a transfer of ownership of a cable system on concessions from the cable operator that could not lawfully be required under Title VI or the First Amendment. But the Ninth Circuit held that as long as a local government can manufacture a "fairly debatable" basis for denying a transfer of ownership, App. at 7a, courts are precluded from determining the extent to which the government has, in fact, denied the transfer for illegitimate reasons.

There is no basis for such broad "legislative deference." First of all, the County was not engaged in legislative

decisionmaking. Its right to approve transfers of ownership was set forth in the terms of its franchise *agreement* with the cable operator, which also provided that it could not "unreasonably" withhold approval. In determining whether or not to consent to a transfer of ownership, the local government was not making the sort of unilateral legislative decision to which broad deference is sometimes due. It was fulfilling its contractual obligations under the franchise agreement.

In any event, even when local governments make unilateral determinations regarding cable operators that directly affect the right of a particular person to provide cable service to a community, they are not entitled to the broad deference afforded by the Ninth Circuit's decision. Because franchising authorities' determinations are constrained by comprehensive federal legislation and by the First Amendment, courts must be empowered to scrutinize – not simply defer to – their stated reasons.

This Court recognized in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), that when a local government decides to deny a cable franchise, the impact of such a decision on protected speech requires careful scrutiny of the underlying facts. The Ninth Circuit's standard of broad legislative deference is wholly at odds with that approach.

Furthermore, the Federal Communications Commission specifically recognized that cities would be tempted to use the transfer approval process to extort all sorts of concessions that they could not otherwise impose on cable operators. And it made clear that such efforts to circumvent the constraints of Title VI are impermissible. The Ninth Circuit's standard allows local governments to violate that federal edict with impunity so long as they can generate any plausible pretext for denying approval.

Finally, the Ninth Circuit took the First Amendment out of play altogether by holding that when a cable operator

grants a local government the right to approve transfers of ownership, it waives any First Amendment rights that it may have had with respect to such approval. This holding is flatly at odds with this Court's presumption against the waiver of Constitutional rights. This Court requires a clear showing of an intent to relinquish or abandon such rights. Especially where, as in this case, the franchise agreement precludes the local government from "unreasonably" denying consent to a transfer, the Ninth Circuit had no basis for simply assuming that the cable operator meant to remove all First Amendment constraints during the transfer approval process.

ARGUMENT

I. THE "LEGISLATIVE DEFERENCE" STANDARD APPLIED BY THE NINTH CIRCUIT UNDERMINES IMPORTANT FEDERAL POLICIES EMBODIED IN THE COMMUNICATIONS ACT AND THE FCC'S RULES.

The core issue in this case is the standard for determining, on judicial review, whether a local government has unreasonably refused to consent to a transfer of ownership of a cable television system. The Ninth Circuit applied a highly deferential standard of review, treating the government's action as a "legislative" action, which must be deemed reasonable as long as any one reason for the decision is at least "fairly debatable." App. at 7a.

This standard – which the court called "much more forgiving" than the standard applied by the district court, App. at 5a. – would substantially undermine the comprehensive federal statutory framework adopted by Congress for the regulation of cable television. That framework, first enacted in 1984 as Title VI of the Communications Act of 1934, as amended, 47 U.S.C. §§ 521 *et seq.*, preserves a role for local governments in regulating the provision of cable service by cable systems that use public rights-of-way. But the role is carefully and narrowly defined and circumscribed.

Before Title VI was enacted in 1984, local governments had routinely demanded a variety of concessions from cable operators in return for the right to use public rights-of-way.[2] Some of these concessions were related to the provision of cable service. For example, cities demanded the right to regulate the rates charged for cable service, to dictate the types of equipment and facilities to be deployed, and to approve the particular programming services to be offered by the cable system. Other concessions had nothing to do with the provision of cable service and were simply a form of payment or tribute to the local government. Cities routinely required cable operators to pay a "franchise fee," and, in addition, often required operators to provide municipal parks, swimming pools or other in-kind benefits.

In all these areas (and others), the enactment of Title VI's provisions limited what cities may require. Cities may only regulate the rates of systems that are not subject to "effective competition," and they may only regulate rates for the basic tier of service provided to all subscribers. 47 U.S.C. § 543. They may not insist on the provision of particular programming but may enforce agreements by an operator to provide certain "broad categories" of programming. *Id.*, § 544. They may require cable operators to pay a franchise fee, but the fee is strictly limited to five percent of an operator's gross revenues from the provision of cable service – and it

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[2] *See* S. Rep. No. 98-67, 98th Cong., 1st Sess. 6 (1983) ("Unlike previous licenses which were based upon the police power, many modern cable franchises touch virtually every aspect of a cable system's operation. The premise for the exercise of this expanded local jurisdiction over cable systems continues to be its use of local streets and rights of way. In the past, local regulation bore a reasonable relationship to that use. With the introduction of cable into larger markets and the expansion of services provided over cable, the degree and detail of local regulation has increased and there is no longer a reasonable relationship between local regulation and cable systems' use of streets and rights of way. S. 66 seeks to restore the jurisdictional boundaries over cable to their more traditional positions.").

includes any assessments, including in-kind contributions, that are uniquely imposed on cable operators and are not fees or assessments of general applicability. *Id.*, § 542.

Cities may include in their franchise agreements with cable operators a requirement that the operator obtain consent from the city for any transfer of ownership or control of its cable system. As the Federal Communications Commission has noted, cities might well be tempted to use this authority over transfers of control to extract from cable operators concessions and payments that exceed what they are otherwise permitted by Title VI to require. Therefore, while noting that the statute "does not require the Commission to adopt substantive standards governing the approval of transfers," it made clear that

> in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate regulation, franchise fees or other matters. For example, a franchising authority may not delay a transfer or impose conditions on a transfer authorization that would impinge upon the Commission's statutory authority.

Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 6828, 6834 n.38 (1993).

In the present case, the district court found that the County had attempted to impose conditions on the approval of a transfer of control that would have been at odds with the limitations and prohibitions of Title VI. For example, it asked that Charter pay a $500,000 "mitigation fee" for approval of the transfer, which, in combination with the franchise fees already assessed on Charter, would have violated the franchise fee limits of Title VI. It also sought a freeze on the rates charged to subscribers, which would have violated the rate regulation provisions of the statute. And it imposed upon Charter a request for information that the district court found

"so unreasonable in its scope" as to violate the FCC's rules limiting the material that may be requested in connection with the transfer approval process.

The Ninth Circuit did not dispute that the County had asked for all these concessions. Nor did it specifically disagree that if the County had denied the transfer because of Charter's refusal to accede to any of these unlawful conditions, the denial would have been unreasonable and impermissible. But the Ninth Court held that the district court was effectively precluded from determining whether this was, in fact, the case. It held that the district court could only examine the County's stated reasons for denying the franchise, and if any one of those reasons was not irrational on its face, the denial must be deemed reasonable.

Under this deferential standard, cities will be able to violate Title VI and the FCC's regulations with impunity. The Ninth Circuit's standard, in essence, removes all but the pretense of judicial review. No franchising authority would be foolish enough to state explicitly that it denied a franchise transfer application solely because the cable operator refused to agree to unlawful conditions. And no court would be empowered to scrutinize the franchising authority's stated reasons to determine whether they were mere pretexts and whether the franchising authority would, in fact, have approved the transfer if the cable operator had acceded to the unlawful conditions.

In these circumstances, franchising authorities will have no trouble coming up with such pretexts. They will have every incentive to use the transfer process to extract the fees and regulatory concessions that Congress enacted Title VI in order to prevent. And cable operators seeking to complete a transfer of ownership will have little choice but to accede to the cities' demands. The decision of the Ninth Circuit, if allowed to stand, will therefore undermine important policies and regulatory determinations that Congress put in place in order to balance the interests of local governments, cable operators and consumers.

II. THERE IS NO BASIS IN LAW OR PRECEDENT FOR APPLYING "LEGISLATIVE DEFERENCE" TO MUNICIPAL REVIEW OF TRANSFERS OF OWNERSHIP OF CABLE SYSTEMS.

The Ninth Circuit based its decision on the premises that the County's determination of whether or not to approve a transfer of ownership was a "legislative" determination, and that such legislative determinations are generally subject, as a matter of law, to broad and forgiving deference. Neither premise is correct.

Unlike its initial determination to grant a franchise to a cable operator, there was nothing even arguably "legislative" about the County's review of a transfer of ownership. What was at issue was not, as the Ninth Circuit suggested, "an application for government *privileges*." App. 6a, *citing Gifford v. City of Los Angeles*, 88 Cal.App.4th, 801, 806 (2001) (emphasis added). Nor was the County acting pursuant to "an agreement that contemplates future *discretionary* approvals." *Id.*, *citing Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors*, 84 Cal.App.4th 221, 227, 233 (2000) (emphasis added).

The County's authority to review transfers of ownership was based on the franchise agreement that it entered into with the cable operator. Under that agreement, the County could not "unreasonably" withhold its consent. Thus, in determining whether or not to consent to a transfer of control, the County was not legislating or acting with unfettered discretion. Nor was it considering whether to grant a "privilege." It was acting pursuant to – and was bound by – its contractual obligations under the franchise agreement.

In any event, even "legislative" determinations by local governments regarding the terms and conditions on which cable operators are permitted to provide service – and, in particular, determinations regarding who shall be allowed to operate a cable system – are not entitled to the broad

deference mandated by the Ninth Circuit. This Court held as much in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). That case involved a city's determination not to grant a franchise to a prospective cable operator. The Court, recognizing that "the activities in which [the franchise applicant] allegedly seeks to engage plainly implicate First Amendment interests," refused to defer to the factual findings upon which the City had based its denial of the franchise:

> The City has adduced essentially factual arguments to justify the restrictions on cable franchising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by respondent. We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely.

476 U.S. at 494.

The district court undertook precisely the type of factual inquiry suggested in *Preferred*. But the Ninth Circuit rejected the district court's approach and held that the permissive standard of legislative deference applies "even when First Amendment rights are implicated through secondary effects," J.A. 7a. In doing so, it relied on two recent decisions of this court. The holdings in those cases are wholly inapposite, and there is, in fact, no basis for such a standard.

City of Los Angeles v. Alameda Books, Inc., 122 S.Ct. 1728 (2002) was a zoning case, in which the city prohibited adult bookstores, arcades, and other adult-oriented establishments from locating within 1,000 feet of another such establishment, or within 500 feet of any religious institution. The ordinance was aimed at restricting criminal activity that the city found likely to accompany a concentration of adult stores and arcades. The Court held that the city's findings regarding the likelihood of such criminal

activity were entitled to substantial deference. *Id.* at 1736-37 (plurality opinion).

But, as Justice Kennedy made clear, the Court's analysis was limited to "time, place and manner" restrictions that are intended to suppress secondary effects that may accompany speech *without suppressing the speech itself.* *Id.* at 1742 (Kennedy, concurring) ("a city may not, regulate the secondary effects of speech by suppressing the speech itself"). In contrast, refusing to permit a transfer of ownership directly suppresses speech itself. Like the municipal decision at issue in *Preferred Communications*, *supra*, it completely prevents the proposed transferee from providing cable television service to the residents of the community. And, as was the case in *Preferred Communications*, the facts and findings asserted by a city to support such a refusal are not entitled to the legislative deference that might apply to the facts and findings asserted in support of a "time, place or manner" regulation that targets and suppresses only the secondary effects associated with speech.

Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996), was a case involving the speech rights of government employees and independent contractors working for the government. The Court held that in such cases, the government has an "interest in being free from intensive judicial supervision of its daily management functions," and that "[d]eference is therefore due to the government's reasonable assessments of its interests *as contractor.*" *Id.* at 678 (emphasis in original). But this deference is unique to cases in which the government acts in a managerial role, because, as the Court specifically pointed out, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one *when it acts as employer.*" *Id.* at 676 (*quoting Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion) (emphasis added)).

There is, in short, no support in this Court – and, indeed, the Ninth Circuit cited no support from any other federal court – for the Ninth Circuit's invention that a local government is entitled to substantial "legislative deference" in determining whether to authorize a transfer of ownership of a cable system. The government's authority to determine who may and who may not operate a cable television system is circumscribed by the First Amendment, which generally results in *heightened* scrutiny of the decisionmaking process. And, in this case, it is also narrowly circumscribed by the terms and policies of Title VI of the Communications Act, which limit the conditions that local governments may "reasonably" insist upon in return for approval of a transfer of ownership.

III. A CABLE OPERATOR DOES NOT WAIVE FIRST AMENDMENT RIGHTS WHEN IT AGREES TO ALLOW THE GOVERNMENT TO REVIEW – BUT NOT UNREASONABLY WITHHOLD CONSENT TO – TRANSFERS OF OWNERSHIP.

The Ninth Circuit swept aside the First Amendment implications of the County's refusal to consent to a transfer of ownership, instead holding that a cable operator waived its First Amendment rights when it "voluntarily entered into an agreement under which the County had to approve any transfer of the franchise." J.A. 11a. Under the standards set forth by this Court for determining whether a party has waived its Constitutional rights, no such waiver could conceivably have occurred.

As this Court has held,

> The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, . . . and for a waiver to be effective it must be clearly established that there was 'an intentional

> relinquishment or abandonment of a known right or privilege.'

Brookhart v. Janis, 384 U.S. 1, 4 (1966), *citing Glasser v. United States*, 315 U.S. 60, 70-71 (1942), *and quoting Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The Ninth Circuit stood this holding on its head. In the absence of language in the franchise agreement clearly establishing that the cable operator had *not* intended to relinquish or abandon its First Amendment rights, it presumed that the operator *had* waived those rights. Even if the language of the franchise agreement had given the County the unqualified right to approve transfers of ownership, it would have been wrong to presume a waiver without any other evidence of the cable operator's intent. But in this case – as in virtually all cable franchises – the right to approve transfers of ownership was *not* unqualified. The franchise agreement specifically provided that the County could not "unreasonably withhold" its consent to a transfer.

It would be fair to construe this language, even in the absence of a presumption against waivers of Constitutional rights, as precluding the County from refusing to consent to a transfer because the cable operator refused to agree to conditions that would violate its First Amendment rights. If using the franchise transfer process to extort concessions that would otherwise be barred by the First Amendment or by the Communications Act is not "unreasonable," it is hard to imagine what is.

But this Court has held that there *is* a presumption against waivers. It flies in the face of that doctrine to hold that an agreement that prohibits the local franchising authority from unreasonably withholding consent to a transfer of ownership constitutes a blanket waiver of the cable operator's First Amendment rights. (And, in any event, it cannot conceivably be the case that the proposed *transferee* – the person who, after all, is being prevented from operating a cable system by the franchising authority's denial of consent –

somehow waived *its* rights when the incumbent cable operator entered into a franchise agreement.)

Not every restriction and condition imposed on a cable operator impermissibly infringes First Amendment rights. But this Court has repeatedly held that cable operators engage in speech that is protected by the First Amendment and that regulation of such speech must be subjected to the various levels of heightened scrutiny that apply to content-based or content-neutral regulation. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994); *Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications*, *supra*, 476 U.S. at 494-95. The Ninth Circuit's decision threatens to turn the franchise transfer process into a First Amendment-free zone, in which local franchising authorities can interfere with the protected speech of cable operators without being subjected to *any* First Amendment scrutiny.

IV. THE ISSUES RAISED IN THIS CASE ARE OF GENERAL AND NATIONWIDE SIGNIFICANCE.

The decision of the Ninth Circuit, if left in place, will have serious consequences for cable operators and consumers nationwide. Congress provided cable operators with a wide range of carefully delineated statutory protections against local governments' exercise of monopoly control over an essential input in cable operators' provision of service (namely, public rights-of-way). *See, e.g.*, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 19 (1984) (1984 Cable Act "defin[es] and limit[s] the authority that a franchising authority may exercise through the franchise process"). In addition, this Court has recognized that cable operators enjoy considerable protections under the First Amendment. *See* Section III, *supra*. Yet, as described in the preceding sections, the Ninth Circuit's decision effectively enables local franchising authorities to circumvent the constraints of the Communications Act and the First Amendment whenever a cable operator seeks approval for a transfer ownership.

The practical consequence of that decision is considerable. As a result of trends toward consolidation and regional clustering of cable systems, transfers of ownership of cable companies and individual cable systems occur with some frequency. In addition, various kinds of corporate reorganizations (including re-incorporations and restructurings) commonly require approval by local franchising authorities. Thus, many cable systems are involved in one or more events requiring franchising authority approval once every two or three years. And each time such an event takes place within the Ninth Circuit, the franchising authority will be encouraged and enabled by the court's decision to extract concessions that are at odds with the Communications Act and the First Amendment.

Moreover, the impact of the decision will extend well beyond the Ninth Circuit. Most cable systems in the United States are owned by multiple system owners like Charter, which sometimes own systems serving hundreds or even thousands of local communities. Thus, many of the transfers of ownership that take place – such as mergers of multiple system owners or "swaps" of cable systems to bring clusters under unified control – involve multiple systems across the nation. If some of the systems being transferred are in the Ninth Circuit, and, as the result of the decision below, those systems will be effectively forced to relinquish statutory and First Amendment rights in the transfer approval process, many of those transactions will be discouraged. Insofar as such transactions improve efficiency, cable subscribers across the country will be worse off.

Thus, this case presents questions of broad national significance. The decision below undermines the federal regulatory framework of Title VI and threatens the First Amendment rights of cable operators – not only in the Ninth Circuit but nationwide.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC, AND
PAUL G. ALLEN, PETITIONERS

v.

SANTA CRUZ COUNTY, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a local franchising authority may refuse to consent to transfer of a cable television franchise so long as, viewed under a highly deferential standard, the authority has one or more plausible and permissible bases for doing so, even if the local franchising authority's refusal was also in fact based on one or more factors not permitted by federal law.

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BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners maintain that a local franchise authority improperly denied their application to transfer a cable television franchise to the new owner of the local cable system in Santa Cruz County, California. The district court found that the County's denial was based on multiple reasons and that action taken on the basis of each of those reasons would violate federal law. The court of appeals left most of the district court's findings unreversed, but held that the County acted

properly because there was at least one plausible basis on which it could have acted that would not have violated federal law.

The Ninth Circuit's standard gives inadequate protection to federal law, because it permits local authorities to act for reasons that violate federal law, so long as they also have at least one plausible, legal basis for acting. Although the Court may wish to grant review for that reason, this case is the first to have addressed the problem of "mixed motives" in this setting, and this Court's review may appropriately await the further development of the law in this area in future cases and in other courts of appeals.

1. Throughout its history, cable television in the United States has primarily "been regulated at the local government level through the franchise process." H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984) (*1984 House Report*). Until the 1980s, franchise obligations and renewal procedures would typically "vary from city to city, and state to state." *Id.* at 25. In 1984, Congress concluded that the absence of uniform national standards for cable franchising was impeding the development of the technology. To address that problem, Congress passed the Cable Communications Policy Act of 1984 (1984 Cable Act), Pub. L. No. 98-549, 98 Stat. 2779 (42 U.S.C. 521 *et seq.*). The Act imposed a cap on the amount of franchise fees that local officials could assess on cable systems. 47 U.S.C. 542(b). It also adopted standards restricting the ability of franchising authorities to regulate the services, facilities, and equipment provided by cable operators. 47 U.S.C. 544. Those provisions and others in the 1984 Cable Act were designed "to provide stability and certainty to the process of granting and renewing cable franchises," *1984 House Report* 22, which in Congress's judgment were "essential" to the growth and development of cable television. *Id.* at 20.

More recently, Congress has further limited the power of local franchise authorities to regulate cable television. In 1992, Congress gave the Federal Communications Commission exclusive jurisdiction over rate regulation for certain categories of cable television service. See Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, § 3, 106 Stat. 1464; 47 U.S.C. 543.

Four years later, as part of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress set a sunset date of March 31, 1999, for the regulation of most cable programming service rates. 47 U.S.C. 543(c)(4). Since that date, neither the FCC nor any state or local government has had the authority to regulate rates for cable services outside a basic service tier. See 47 U.S.C. 543(b)(7) (defining basic cable service tier).

2. Before control of a cable system can change hands, the parties to the transaction ordinarily must apply to the local franchise authority for authorization to transfer control of the cable franchise to the proposed new owner. As part of the 1992 Cable Act, Congress imposed a time limit on local governments' review of applications for franchise transfers. As now codified at 47 U.S.C. 537, the Act specifies that local franchise authorities have 120 days to act upon any transfer request "that contains or is accompanied by such information as is required in accordance with Commission regulations and by the franchising authority." Moreover, "[i]f the franchising authority fails to render a final decision on the request within 120 days, such request shall be deemed granted unless the requesting party and the franchising authority agree to an extension of time." 47 U.S.C. 537.

To implement that provision, the FCC adopted rules specifying the information that transfer applicants must provide to local franchise authorities. *Implementation of Sections 11 and 13 of the Cable Television Consumer Protec-*

tion and Competition Act of 1992, 8 F.C.C.R. 6828, 6840 (1993). The Commission developed a standardized form known as FCC Form 394, which was designed to include information necessary for applicants to demonstrate the legal, technical, and financial qualifications of a prospective new owner. Among other things, Form 394 requires transfer applicants to produce a balance sheet and income statement for at least one full year, as well as a narrative account of the transferee's technical qualifications to operate a cable television system. See *id.* at 6867-6876 (App. B).

FCC rules provide that after a cable operator seeking approval for a franchise transfer submits to the local franchising authority "a completed FCC Form 394, together with all exhibits, and any additional information required by the terms of the franchise agreement or applicable state or local law," the authority has 120 days in which to review the transfer. 47 C.F.R. 76.502(a). The rules also impose a separate, 30-day deadline: "A franchise authority that questions the accuracy of the information provided [by the cable operator] must notify the cable operator within 30 days of the filing of such information, or such information shall be deemed accepted, unless the cable operator has failed to provide any additional information reasonably requested by the franchise authority within 10 days of such request." 47 C.F.R. 76.502(b).

When it promulgated the rules, the Commission stated that "[i]n addition to the information specifically solicited by the FCC Form, franchise authorities are permitted to request such additional information as is reasonably necessary to determine the qualifications of the proposed transferee." 8 F.C.C.R. at 6840. The FCC also, however, warned local franchise authorities not to use their review of transfer applications as a device for evading federal law: "[I]n exercising their transfer jurisdiction, franchising authorities may not seek to circumvent the Commission's authority over rate

regulation, franchise fees or other matters. For example, a franchising authority may not delay a transfer or impose conditions on a transfer authorization that would impinge upon the Commission's statutory authority." *Id.* at 6834 n.38.

3. In July 1998, Paul Allen, the co-founder of Microsoft, entered into an agreement to purchase Charter Communications, Inc., a cable operator that holds cable franchises in Santa Cruz County and nearly 500 other communities throughout the United States. Pet. App. 21a. The company filed an application to transfer its cable franchise, including an executed FCC Form 394, with each of its local franchise authorities. *Id.* at 24a.

Charter filed its Form 394 with Santa Cruz County on August 18, 1998. Pet. App. 22a. Less than two weeks later, the County sent Charter a lengthy request for additional information, with some 70 questions that centered on the possible future impact on rates and details of the economics of the proposed transaction. *Id.* at 28a, 60a. Charter responded by producing "a two-inch thick, written response with back-up documents" on September 17, 1998. *Id.* at 29a.

On November 2, 1998, the County presented Charter with a second information request that "included 31 paragraphs of inquiry." Pet. App. 33a. Charter refused to provide any further information, taking the position that the County's second information request was unreasonable and that the County already had sufficient information to assess the merits of the transfer application. *Id.* at 34a-36a.

Also on November 2, the County proposed that Charter undertake and pay for a "due diligence study" to assess the financial feasibility of Allen's acquisition of Charter and the impact of the transaction on future cable rates. Pet. App. 25a-27a, 30a-33a. Charter declined to finance or conduct such a study. It contended that the County's concerns about

Charter's financial viability were unwarranted. *Id.* at 36a-38a.

On December 8, 1998, the County's Board of Supervisors adopted a resolution denying Charter's transfer application. The resolution stated that the transfer application

> is hereby disapproved for the following reasons:
>
> (a) The Applicants have failed to timely provide all necessary additional information, as requested by the County in writing, relating to the Transfer's potential impact upon existing and future rates and the legal, technical and financial qualifications of the Buyer to own and operate the cable television system serving the County (the "System").
>
> (b) The Applicants have refused or failed to reasonably cooperate with County Staff, Special Counsel, and outside consultants retained by the County in undertaking the due diligence investigation of the Transfer.
>
> (c) The Buyer has failed to demonstrate that it is a technically and financially qualified applicant for the following reasons[.]

C.A. E.R. 350; see Pet. App. 38a-39a. The resolution continued with a recital of reasons why the information supplied by Charter was allegedly insufficient. C.A. E.R. 350-356.

After the Board denied Charter's application, Charter sought to ascertain what it could do to obtain approval of the transfer without responding to the additional information requests. On December 15, 1998, the Board adopted a resolution authorizing approval of the transfer agreement so long as Charter "substantially satisfie[d] most of" the following conditions: "[e]xtend[ing] the rate freeze" that had been imposed in connection with Charter's earlier acquisition of the local cable franchise, "improv[ing] the indexing

method for rate increases," and "[p]rovid[ing] the County with a mitigation payment" of $500,000. Pet. App. 41a; see C.A. E.R. 468. Charter refused to accept those conditions. Pet. App. 41a.

On December 23, 1998, the transaction closed without the approval of Santa Cruz County. Pet. App. 42a. In March 1999, the County issued a preliminary notice that Charter had violated the franchise agreement by closing the transfer without the County's consent. The notice threatened to terminate or revoke the franchise agreement and/or seek liquidated damages. *Ibid.*

4. Charter and Allen filed suit against the County in the United States District Court for the Northern District of California. They alleged that the County had unreasonably withheld approval of Charter's transfer application. They advanced claims under 42 U.S.C. 1983 that the County's action violated the First Amendment and the Just Compensation Clause of the Fifth Amendment. They also claimed that the County's action violated several provisions of the Cable Act and constituted a breach of their contract with the County. In an order issued on November 10, 1999, the district court dismissed petitioners' Just Compensation claim as unripe and dismissed their Cable Act claim on the ground that petitioners had no private right of action under the Act. The court allowed petitioners' First Amendment and state-law contract claims to go forward.

Following a two-week bench trial, the district court ruled in favor of Charter and Allen. The district court found that the County's denial of Charter's transfer application "was based upon plaintiffs' refusal to comply with the County's information requests, its demand for an independent financial study to be financed by Charter, its demand for cash payment of $500,000 and its demand for a further rate freeze." Pet. App. 42a-43a. The district court found that each of those reasons for the denial was unlawful.

a. First, based in part on its analysis of the FCC's 120-day and 30-day rules, see Pet. App. 44a-60a, the court concluded that the County's requests for additional information were "unreasonable." *Id.* at 61a, 62a. The court found that the "massive and sweeping" first request consisted mostly of "boiler-plate questions having little or nothing to do with the actual transaction" and that it included "a large number of other questions" about financing arrangements that were not a part of the transaction. *Id.* at 61a.

The court found that the County's November 2 information request asked numerous questions based on a faulty reading of Charter's earlier responses, that it "would have required Charter to go out and locate third-party sources of information and then to vet its internal projections against such external data," and that it attempted to resurrect issues that were "procedurally foreclosed" to the County under the court's interpretation of the FCC's 30-day rule. Pet. App. 62a-63a. The court found that "the large number [of questions] actually propounded and the bone-crushing work the answers would have entailed rendered them unreasonable in scope." *Id.* at 62a.

Finally, the court found that the proposed scope of the County's demand on November 2 that the County conduct a due diligence study was "unreasonable and unlawful." Pet. App. 64a. The court explained that "[g]ranting that [the franchising authority] has the right to make reasonable detailed inquiries into the extent to which a change of control would impact rates and/or service," the connection between the information sought "and any future impact on rates and service was simply too remote and tenuous to qualify as reasonable additional information in an expedited process limited to 120 days." *Ibid.*

b. The district court also determined that the County's demands that Charter bear the $39,000 cost of the due diligence study and make a "mitigation payment" of $500,000

violated federal law governing franchise fees, because the County was already collecting the maximum franchise fee permitted under the Communications Act—five percent of Charter's annual revenues from cable services. Pet. App. 67a; see 47 U.S.C. 542(b). The court rejected the County's contention that Charter's failure to pay for the due diligence study was not a basis for its December 8 refusal to consent to the transfer, characterizing that contention as "simply not true" and "palpably wrong." Pet. App. 68a, 69a. See also *id.* at 70a ($500,000 payment "blatantly illegal—a further violation of the * * * statutory cap" on franchise fees).

c. Finally, the district court ruled that the County could not lawfully condition approval of Charter's franchise transfer on the extension of the rate freeze the County had first obtained when Charter had itself acquired the local cable franchise from Sonic Cable Television in 1998. Pet. App. 16a-19a. Federal law prohibits local franchising authorities from regulating the rates of cable services outside the basic service tier. 47 U.S.C. 543. The court had already found that the rate freeze the County had obtained in connection with the Sonic transaction was "illegal under federal law." Pet. App. 21a. The court held that the County's effort to condition its approval of the transaction after December 8 on an extension of the rate freeze was "illegal too" and "violated federal law." *Id.* at 70a, 71a.

d. Having found that the County's denial of Charter's transfer application "was unlawful on multiple grounds," the district court determined that the County had violated its franchise agreement by unreasonably withholding its consent to Charter's change in ownership. Pet. App. 78a. The district court further found that the County's refusal to approve the transfer violated the First Amendment. *Id.* at 72a-77a.

5. The Ninth Circuit reversed. Pet. App. 1a. In the court's view, the case presented "one central issue: did

Santa Cruz County reasonably withhold consent to a change in ownership of a cable franchise?" *Id.* at 2a. See *id.* at 5a ("central question" is "was the County's denial of consent unreasonable").

The court held that, because it was "reviewing a discretionary decision of the County Board of Supervisors, a legislative body," and because it was in part reviewing "requests for information," "the discretion within which the government operates is broad." Pet. App. 5a-6a. The court concluded that, under a "deferential standard" of judicial review, "the County's denial of consent should be upheld as long as there is substantial evidence for any one sufficient reason for denial." *Id.* at 7a. See *id.* at 8a ("We must therefore examine whether any one of the reasons offered by the County Board in its decision and attached exhibits survives scrutiny under a deferential standard.").

The court observed that the County had identified various grounds for denying consent to the transfer, including "Charter and Allen's failure to affirmatively demonstrate financial qualifications to operate a cable system." Pet. App. 8a. Notwithstanding Allen's substantial personal wealth, the court concluded "that it was not unreasonable for the County to be concerned about Allen's true net worth and about the relationship of that wealth to the viability of the enterprise." *Id.* at 9a. The court also addressed "the County's articulated concern for keeping stable the subscriber rates in the future." *Id.* at 9a. The court noted that FCC rules precluded the franchisee from raising rates based on Allen's purchase price for Charter, but observed that "those rules are subject to change." *Id.* at 10a. The court concluded that "it could hardly be unreasonable for the County to be worried about the long-term viability of the Allen purchase and its effects on the County's responsibility to assure a stable cable franchise for its citizens." *Ibid.*

The court therefore held that those "concerns * * *, which were articulated by the County in its denial of consent, were sufficient to justify the County's decision." Pet. App. 11a. The court concluded that it "c[ould] not say the County acted without a rational basis or without substantial evidence for its decision to deny consent," and it reversed the district court's judgment on that basis. *Ibid.* In the court's view, "[b]ecause the record substantially supports at least some of the reasons offered by the County," it did not have to address the question whether "the County acted unlawfully, and therefore unreasonably, in its attempts to gather information beyond what was permitted by * * * the Cable Act and the FCC regulations." *Id.* at 3a n.3. Indeed, the court stated that there is "no reason for either the district court or this panel to reach the issues regarding the Cable Act." *Ibid.* See *id.* at 12a (court "need not reach the other issues addressed by Charter and the district court"). The court thus did not address whether the County's information requests were unreasonable or whether the County had refused its consent for reasons, such as its desire to obtain a rate freeze extension or a $500,000 mitigation payment, that were impermissible under the Cable Act.

Finally, the court disposed of Charter's First Amendment claim on the ground that Charter had "voluntarily entered into an agreement under which the County had to approve any transfer of the franchise," and Charter had, "to that extent * * * waived its right to claim that a denial of a transfer violated the First Amendment." *Id.* at 11a, 12a. See *id.* at 12a n.9 ("Charter was aware of what it was getting itself into.").

DISCUSSION

The district court found that the County had failed to consent to Charter's transfer application for several reasons, all of which were unlawful and beyond the County's authority

under federal law. The court of appeals did not disturb most of those findings, but instead held that because there was in its view "substantial evidence for * * * one sufficient reason for denial," Pet. App. 7a, the County's denial of consent was lawful. The Ninth Circuit erred in concluding that the County's action could be found to be reasonable, and therefore lawful, without *any* inquiry into whether the County had in fact acted for reasons forbidden under federal law.

The Ninth Circuit's error in this case could threaten to undermine important federal restrictions on local cable regulation. Although the Court may wish to grant review in this case to address that concern, it would not be inappropriate for this Court's review to await further developments in the lower courts. The question presented in this case does not appear to have arisen yet in any other appellate case. If the issue is one of genuine significance, it can be expected to arise in other circuits and in other factual settings in the future. This Court might benefit from further analysis by the courts of appeals of cases, like this one, in which a cable franchising authority is found to have acted with mixed motives, some of which are lawful under federal law and some of which are not.

A. The Court Of Appeals Held That The County Had Acted Reasonably, Despite Unreversed District Court Findings That The County Had Acted For Reasons That Were Impermissible Under Federal Law

1. In the present posture of this case, it must be assumed that the County refused its consent to the transfer for five reasons. The County's December 8 resolution denying the transfer application recited that it was based on: (1) Charter's "failure to provide all necessary additional information, as requested by the County in writing," (2) Charter's "refus[al] or fail[ure] to reasonably cooperate * * * in under-

taking the due diligence investigation of the Transfer," and (3) Charter's failure "to demonstrate that it is a technically and financially qualified applicant." C.A. E.R. 350. The district court found that the denial was also based on (4) Charter's "refusal to comply with the County's * * * demand for cash payment of $500,000" and (5) "its demand for a further rate freeze," as expressly embodied in the County's December 15 resolution. Pet. App. 43a.

The district court concluded that each of those five factors was a forbidden basis for action under federal law. The court ruled that the County's additional information requests were "unreasonable" and inconsistent with the expedited, 120-day process mandated by 47 U.S.C. 537. Pet. App. 61a, 62a, 64a. The district court also found that federal limits on franchise fees, see 47 U.S.C. 542(b), precluded the County from requiring Charter to pay for the due diligence study. Pet. App. 70a. The court found that Charter's technical and financial qualifications had to be deemed to be established because the County had not timely requested information on those subjects under the FCC's 30-day rule, *id.* at 61a-62a, and that accordingly "the threshold issues of financial, legal and technical qualifications were established." *Id.* at 63a. Finally, the district court found that requiring Charter to pay the $500,000 mitigation fee was "blatantly illegal" because it contravened the federal limit on franchise fees, *ibid.*, and that the County's attempt to obtain a further rate freeze "violated federal law," *id.* at 70a, 71a.

2. The court of appeals found it unnecessary to address the district court's findings that the County had acted for multiple reasons that were impermissible under federal law. According to the court of appeals, the dispositive question was "whether any *one* of the reasons offered by the County Board in its decision * * * survives scrutiny under a deferential standard." Pet. App. 8a (emphasis added). Under that standard, the court concluded that the County's proffered

concerns about Allen's "true net worth and * * * the relationship of that wealth to the viability of the enterprise," *id.* at 9a, as well as "the long-term viability of the Allen purchase and its effects on the County's responsibility to assure a stable cable franchise for its citizens," were "not unreasonable." *Id.* at 9a, 10a. Those concerns were therefore viewed as being "sufficient to justify the County's decision," because the County had not "acted without a rational basis or without substantial evidence for its decision." *Id.* at 11a.

The court of appeals' decision thus left undisturbed the district court's findings that the County was not permitted by federal law to act on at least four of the five bases for its decisions—Charter's failure to comply with the County's unreasonable information requests, Charter's failure to fund and conduct a due diligence study, Charter's failure to pay the mitigation fee, and Charter's failure to extend the rate freeze. Indeed, although it appears that the court of appeals may have disagreed with the district court's conclusion that the remaining basis for the denial—Charter's financial, technical and legal qualifications—had been established, the court of appeals did not reject the district court's interpretation of the FCC's 30-day rule, under which the County was required by federal law to accept at least some of those qualifications.

The court of appeals found it unnecessary to resolve whether the County had acted for reasons that violate federal law, because the court believed that, even if the district court's findings were correct, the County's action must be upheld as "reasonable" so long as "any one of the reasons offered by the County Board in its decision * * * survives scrutiny under a deferential standard." Pet. App. 8a. Because the County had "at least some good reasons" for acting, the court believed that there was "no reason for either the district court or this panel to reach the issues regarding the Cable Act." *Id.* at 3a n.3. See *id.* at 12a ("We * * *

need not reach the other issues addressed by Charter and the district court."). Thus, the court of appeals' decision stands for the proposition that a franchise authority acts "reasonably" in denying a transfer application so long as, applying a "deferential standard," there is "substantial evidence for any one sufficient reason for denial" that does not violate the Cable Act. *Id.* at 7a.[1] The fact that the County had other reasons for the denial that violated federal law, or that those other reasons may have been crucial to the County's decision, is of no relevance under the court of appeals' analysis.

B. The Court Of Appeals Erred In Permitting The County To Act For Reasons That Violate Federal Law

1. The court of appeals' standard fails to provide adequate protection to federal law and federal interests in this area.[2] Where only state-law rights are at stake, a State has broad latitude to construe a contract provision prohibiting franchising authorities from unreasonably withholding their consent to a franchisee's application. In such a setting, a

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[1] The court of appeals' citations to this Court's cases applying rational basis scrutiny to legislative classifications that are *not* prohibited by the Constitution or federal law confirm that the court intended an exceptionally deferential review. See Pet. App. 7a (citing *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), for the proposition that "attacks on legislative arrangements have [the] burden of refuting each conceivable basis that might support it"), 8a (citing *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980)). Indeed, at one point the court stated that "the ultimate question is whether the County *could reasonably have denied its consent* under the circumstances." Pet. App. 3a-4a (emphasis added).

[2] The FCC has not had occasion to address the district court's interpretations of the Cable Act and of the pertinent FCC regulations. The government accordingly takes no position on whether the district court correctly construed those provisions.

State could perhaps determine that such a provision means only that the authority must have one "fairly debatable" basis for withholding its consent.[3] But where, as here, federal law prohibits a franchising authority from acting for certain reasons, the authority's action cannot be upheld on the ground that the authority may have had permissible, as well as impermissible, reasons for acting.

2. The Ninth Circuit's decision upholding the County's denial of the transfer application invites circumvention of federal law by local franchising authorities and would fail to vindicate important federal rights. For example, in *City of New York* v. *FCC*, 486 U.S. 57 (1988), this Court upheld the FCC's preemption of local cable technical standards that differ from federal standards. Nonetheless, under the Ninth

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[3] The court of appeals cited (Pet. App. 7a-9a) three state cases that applied a deferential "substantial evidence" or similar test to a local administrative decision. Each of those cases involved a claim that the challenged decision was not supported by the evidence. None of those cases, however, involved a claim that the challenged decision was made on a basis that was independently prohibited under state or federal law. See *Gifford* v. *City of Los Angeles*, 106 Cal. Rptr. 2d 164, 168 (Ct. App. 2001) (denial of permit to carry concealed firearm held not to be arbitrary or capricious); *Desmond* v. *County of Contra Costa*, 25 Cal. Rptr. 2d 842, 842 (Ct. App. 1993) (denial of land use permit to build second residential unit on a lot supported by substantial evidence); *Saad* v. *City of Berkeley*, 30 Cal. Rptr. 2d 95, 95 (Ct. App. 1994) (denial of permit to build residential unit on lot). Thus, none of those decisions stands for the rule adopted by the court of appeals.

The County suggests (Br. in Opp. 15) that *Communication Systems, Inc.* v. *City of Danville*, 880 F.2d 887 (6th Cir. 1989), and *Union CATV, Inc.* v. *City of Sturgis*, 107 F.3d 434 (6th Cir. 1997), support deferential review here, but those cases are equally inapposite. *Communication Systems* addressed only state-law claims. See 880 F.2d at 890-892. In *Union CATV*, there was no finding of a federal violation; the limited "deference" found appropriate by the Sixth Circuit in that case extended only to the local government's exercise of its federal statutory authority to make certain policy choices. 107 F.3d at 438-442.

Circuit's decision, a franchise authority could expressly condition the grant or transfer of a franchise on the cable operator's adoption of technical standards that deviate from the norm established by FCC rules, so long as the authority also identified a plausible alternative rationale for its action.

Similarly, federal law caps local franchise fees and precludes localities from regulating most cable rates. See 47 U.S.C. 542(b), 543. Franchising authorities may have substantial financial and political incentives to circumvent those federal limitations. Under the Ninth Circuit's decision, a franchising authority could accomplish the forbidden ends by doing what the district court found, in unreversed findings, the County did here—expressly conditioning approval of a franchise application on the franchisee's agreement to pay more than the permissible franchise fee or to limit its rates in ways not permitted by federal law. So long as the authority identifies one plausible alternative basis for its action, that action would be upheld. Indeed, although the district court made no ultimate finding that the County's course of conduct was completely pretextual, the court found "plausible evidence * * * to support" Charter's claim in this case that the County "planned all along to raise marginal concerns and eventually to trade them off for illegal considerations, such as the half-million dollar fee." Pet. App. 71a n.10. Under the Ninth Circuit's standard, it appears that the County's "marginal concerns" would be sufficient to sustain its action, regardless of whether the County was raising those concerns in an effort to obtain fees and rate freezes that are beyond its authority under federal law.

3. In other "mixed motive" contexts in which federal law prohibits an action based on the reasons for the action, this Court has long applied a "motivating factor" analysis. Under that analysis, a challenged action based on both permissible and impermissible motives violates the federal prohibition unless the same action would have been taken in the absence

of the impermissible motives. See, *e.g.*, *Desert Palace, Inc.* v. *Costa*, 123 S. Ct. 2148, 2150 (2003) (mixed motive under pre-1991 Title VII); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977) (dismissal of teacher challenged as based in part on exercise of First Amendment rights); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266, 270 (1977) (municipal zoning decision challenged as based on racially discriminatory purpose); *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 401 (1983) (unfair labor practice charge that discharge of employee was based on "antiunion animus"). See also Restatement (Second) of Torts §§ 431(a) (liability if negligence is "substantial factor in bringing about the harm"), 432(1) (negligence not "substantial factor * * * if the harm would have been sustained even if the actor had not been negligent") (1965). A similar standard, rather than the court of appeals' "any permissible factor" standard, would be appropriate here.

C. Although The Issue Is Potentially One Of Importance, Review By This Court Could Await Further Development In Future Cases

Petitioners assert (Pet. 29) with some justification that, under the court of appeals' decision, "other local governments may use the transfer process to demand concessions and extract *quid pro quos* from franchisees that otherwise would be unlawful under federal law." That is a disturbing prospect, and it threatens the achievement of the Cable Act's purposes to "establish a national policy concerning cable communications," 47 U.S.C. 521(1), and to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems," 47 U.S.C. 521(6). This Court accordingly may wish to grant certiorari in this case. If the Court does grant review, the Court may wish to reframe the question

presented along the lines suggested in this brief. See p. I, *supra*. That question would focus the briefing on the core issue that would warrant this Court's attention.[4]

On balance, however, the Court may benefit from postponing review until other courts of appeals have had the opportunity to consider the question presented. The parties do not cite any other similar "mixed motive" case involving local franchising authorities under the Cable Act.[5] If the Ninth Circuit's decision in this case indeed resolved issues of continuing importance, it can be expected that other courts of appeals will have opportunities to address similar issues in the future. This Court would then have the benefit of those courts' development of the law, as applied in a variety of factual settings, before this Court itself would have to address the governing principles. Thus, although this Court's review

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[4] In our view, the First Amendment question presented in the petition does not warrant this Court's review. In the circumstances of this case, the First Amendment gives petitioner at most a right to demand just what it obtained in its contract—that the County not unreasonably withhold its consent to a transfer. If the County's withholding of consent in this case was reasonable, then the First Amendment is satisfied. If the County's withholding of consent was unreasonable, then the case should be disposed of on the ground that the County violated the contractual provision, without reaching any First Amendment question.

[5] This case could perhaps be viewed as involving one potential procedural complexity, because the federal question arises in the context of a state-law breach-of-contract dispute over whether the County complied with its agreement not unreasonably to withhold its consent to a transfer application. Respondent's brief in opposition does not deny that this case presents a federal question under the Cable Act, however, and neither the court of appeals nor the parties cited any California precedent suggesting that it would be considered "reasonable," under California law, for a party to take actions on a basis that would violate federal law. In any event, if any California law did purport to authorize such action, it would likely itself be preempted, especially where, as here, it would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

of the question presented may well be warranted at some point, it would not be inappropriate to postpone such review until the issues can be fleshed out by the courts of appeals in future cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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